Gen. No. 6760. April Term, A. D. 1917. Ag. No. 70.

FRED SCHENCK, Appellee,

vs.

MIDLAND LUMBER COMPANY, Appellant.

Appeal from the Circuit Court of Piatt County.

GRAVES, P. J.

Appellant sold to appellee a quanity of material which is variously spoken of as "utility wall board," "plaster board" and "wall board" and which was to be used in his residence which he was then remodelling in the place of laths and plaster. The proof tends to show that within a few weeks after it was put on the walls it began to bulge, warp and draw apart; that appellee hired a man to put wall paper over it and also pasted cloth over the cracks but it continued to draw apart until it broke the wall paper and made cracks between the pieces of wall board an eighth of an inch wide; that to further protect the defects in the wall made from this wall board appellee had the ceiling in one or more of his rooms panelled.

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Appellee claims the board was warranted to be all rights and to give good satisfaction and that instead of being as warranted it was worse than good for nothing because it was no good for a wall and it cost considerable to put it on and will cost more to remove it and put the walls in shape to be lathed and plastered. Appellant denies that any warranty was given and also claims that the wall board was not properly put on by appellee's workmen. The case was tried by a jury which returned a verdict finding the issues for appellee and assessing his damages at $375 on which verdict a judgment was entered against appellant.

No serious complaint is made of any errors of law, but appellant complains that the verdict is not supported by the evidence. The evidence was conflicting. It is the province of the jury to weigh the evidence and pass upon the credibility of the witnesses. They saw the witnesses and heard them testify and were in a much better position to say on which side the preponderance of the evidence was then we are by reading the record. It is not our province to reverse a judgment on the facts unless the finding of the jury is so manifestly contrary to the weight of the evidence as to

Gen. No. 67460. April Term, A. D. 1917. Ag. No. 76.

FRED SCHENCK, Appellee,

vs.

MIDLAND LUMBER COMPANY, Appellant.

Appeal from the Circuit Court of Piatt County.

GRAVES, P. J.

Appellant sold to appellee a quantity of material which is variously spoken of as "utility wall board," "plaster board" and "wall board" and which was to be used in his residence which he was then remodeling in the place of lathe and plaster. The proof tends to show that within a few weeks after it was put on the walls it began to bulge, warp and draw apart; that appellee hired a man to put wall paper over it and also pasted cloth over the cracks but it continued to draw apart until it broke the wall paper and made cracks between the pieces of wall board an eighth of an inch wide; that to further protect the defects in the wall made from this wall board appellee had the ceiling in one or more of his rooms papered.

(Page 1)

Appellee claims the board was warranted to be all right and to give good satisfaction and that instead of being as warranted it was worse than good for nothing because it was no good for a wall and it cost considerable to put it on and will cost more to remove it and put the walls in shape to be lathed and plastered. Appellant denies that any warranty was given and also claims that the wall board was not properly put on by appellee's workmen. The case was tried by a jury which returned a verdict finding the issues for appellee and assessing his damages at $375 on which verdict a judgment was entered against appellant.

No serious complaint is made of any errors of law, but appellant complains that the verdict is not supported by the evidence. The evidence was conflicting. It is the province of the jury to weigh the evidency and pass upon the credibility of the witnesses. They saw the witnesses and heard them testify and were in a much better position to say on which side the preponderance of the evidence was than we are by reading the record. It is not our province to reverse a judgment on the facts unless the finding of the jury is so manifestly contrary to the weight of the evidence as to

challange attention at the first blush. We have carefully read and considered the evidence in this record and are not able to say the verdict on the merits of the controversy is not supported by it. The amount of the verdict is large, possibly larger than it should be, but no complaint is made that it is excessive. The judgment is affirmed.

Judgment Affirmed.

Gen. No. 6766. April Term, A. D. 1912. Ag. No. 76.

FRED SCHENCK, Appellee,

vs.

NICLAND LUMBER COMPANY, Appellant.

Appeal from the Circuit Court of Piatt County.

GRAVES, P. J.

Appellant sold to appellee a quantity of material which is variously spoken of as "utility wall board," "plaster board" and "wall board" and which was to be used in his residence which he was then remodelling in the place of lath and plaster. The proof tends to show that within a few weeks after it was put on the walls it began to bulge, warp and draw apart; that appellee hired a man to put wall paper over it and also pasted cloth over the cracks but it continued to draw apart until it broke the wall paper and made cracks between the pieces of wall board an eighth of an inch wide; that to further protect the defects in the wall made from this wall board appellee had the ceiling in one or more of his rooms papered.

(Page 1)

Appellee claims the board was warranted to be all right and to give good satisfaction and that instead of being as warranted it was worse than good for nothing because it was no good for a wall and it cost considerable to put it on and will cost more to remove it and put the walls in shape to be lathed and plastered. Appellant denies that any warranty was given and also claims that the wall board was not properly put on by appellee's workmen. The case was tried by a jury which returned a verdict finding the issues for appellee and assessing his damages at $375 on which verdict a judgment was entered against appellant.

No serious complaint is made of any errors of law, but appellant complains that the verdict is not supported by the evidence. The evidence was conflicting. It is the province of the jury to weigh the evidence and pass upon the credibility of the witnesses. They saw the witnesses and heard them testify and were in a much better position to say on which side the preponderance of the evidence was than we are by reading the record. It is not our province to reverse a judgment on the facts unless the finding of the jury is so manifestly contrary to the weight of the evidence as to

challange attention at the first blush. We have carefully read and considered the evidence in this record and are not able to say the verdict on the merits of the controversy is not supported by it. The amount of the verdict is large, possibly larger than it should be, but no complaint is made that it is excessive. The judgment is affirmed.

Judgment Affirmed.

Gen. No. 6578. October Term A. D. 1916. Ag. No. 6.

Henry Kreher, Executor of the Last will and Testament of Richard Kreher, deceased,
Appellee,
vs.
John B. Beckett, George D. Miller, J. A. Brown et al,
Appellants.

Appeal from Circuit Court Macon County.

ELDREDGE, J.

Appellee, as executor of the last will and testament of Richard Kreher, deceased, filed his bill in equity in the Circuit Court of Macon County to enjoin the prosecution of a suit at law in that court, to recover upon certain promissory notes brought by appellants John B. Beckett and George D. Miller, they being two of three trustees under a deed of assignment made by a co-partnership consisting of J. W. Brown and Charles Crow, doing a banking business under the name of J. W. Brown & Co., the third trustee being one Ezra W. Crow. Appellants filed a cross bill and, upon a hearing, the Chancellor dismissed both the original and cross bills for want of equity. From the decree dismissing the cross bill, appellants prosecute this appeal and appellee has assigned cross error to that part of the decree dismissing the original bill for want of equity.

The notes were dated December 7, 1907, and were six in num

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ber called defendant's Exhibits, 2, 3, 4, 5, 6 and 7, respectively, Exhibits 2, 3, 4, and 5 for $4,000.00 each, Ex. 6 for $436.34 and Ex. 7 for $751.34. The notes on their face were made payable to the order of one James McClure. All of said notes were signed by the Blue Mound Coal Company, by H. L. Ferguson, President, and L. R. Shick, Secretary, Ex. 2 was also signed on its face by H. L. Ferguson, C. H. Moomey, William Pistorius, E. W. Crow, D. L. Gage, J. W. Brown & Company and R. Kreher appellee's intestate. This last note was endorsed on the back thereof by James A. McClure to Ezra A. Crow, John B. Beckett and George D. Miller, and also was endorsed by Ezra W. Crow, John B. Beckett and George D. Miller to John B. Beckett and George D. Miller.

Ex. 3 was signed by the same persons above-named,

except Mooney and Gage, and endorsed the same as Ex. 2.

Ex. 4 was executed and endorsed by the same persons respectively as Ex. 3, except that it was signed by J. A. Brown and J. W. Brown instead of J. W. Brown & Co.

Ex. 5 was signed by the same persons as Ex. 2 and was similarly endorsed, except that it was signed by J. A. Brown and J. W. Brown instead of J. W. Brown & Co.

Ex. 6 was signed by the Blue Mound Coal Co., by H. L. Ferguson, President, and L. R. Shick, Secretary, and by E. W. Crow, J. W. Brown

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& Co., R. Kreher, H. L. Ferguson and William Pistorius and was endorsed the same as the others.

Ex. 7 was signed by the Coal Company, by its President and Secretary, and by E. W. Crow, J. W. Brown, J. A. Brown, R. Kreher, H. L. Ferguson, C. H. Moomey, William Pistorius and D. L. Gage and similarly endorsed.

Appellee's intestate had previously signed, on the back thereof, three promissory notes, each for $4,000.00 and bearing 7 per cent interest. They are known in the record as complainant's Exhibits "A", "B", and "C". Exhibits "A" and "B" were dated August 1, 1906, Ex. "A" being due in four months and Ex. "B" in ninety day s after date. Ex. "C" was dated September 10, 1906, and was due in 60 days after date. They were each signed by the Blue Mound Coal Company, by J. A. Brown, President, and L. R. Shick, Secretary. They were payable to the order of J. W. Brown & Co. Ex. "A", besides bearing on its back the signature of R. Kreher, appellee's intestate, also bore the signatures, J. W. Brown, H. L. Ferguson, E. W. Crow, William Pistorius and J. W. Brown & Company.

Ex. "B", besides bearing on its back the name of appellee's intestate, also bore the signatures, J. W. Brown, H. L. Ferguson, E. W. Crow, William Pistorius and J. W. Brown & Company.

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Ex. "C" besides being endorsed on the back by appellee's intestate, bore the signatures, J. A. Brown, J. W. Brown, H. L. Ferguson, E. W. Crow, C. H. Moomey, D. L. Gage and William Pistorius.

Appellee's intestate also had executed a note for a like sum of $4,000.00 dated May 8, 1907, payable to the

order of C. H. Moomey, due ninety days after date with interest at 7 per cent per annum from maturity, which note was also signed by J. W. Brown, J. A. Brown, C. H. Moomey, E. W. Crow, H. L. Ferguson, William Pistorius and D. L. Gage. This note is known in the record as complainant's Ex. "D". There is also shown in the record another note dated May 8, 1907, for $4,000.00 payable to the order of the Millikin National Bank, due ninety days after date, with interest at 7 per cent from maturity signed by C. H. Moomey. This note is known in the record as Ex. "E".

Complainant's Exhibits "A", "B", "C" "D" and "E" have stamped upon them the following: "Paid January 4, 1908, J. W. Brown & Company."

On December 17, 1907, H. L. Ferguson, C. H. Moomey, J. A. Brown, J. W. Brown & Co., William Pistorius, Richard Kreher, Henry Kreher, J. W. Brown, E. W. Crow and D. L. Gage, executed a written agreement under seal known as Ex. 15, and is as follows:

"KNOW ALL MEN BY THESE PRESENTS, that, Whereas, the undersigned, are or formerly were directors of a certain corporation, to

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wit: The Blue Mound Coal Company, a corporation organized and doing business under the laws of the State of Illinois, with its principal office and place of business at Blue Mound, Illinois.

That from time to time it has become necessary to borrow divers large sums of money in order to meet, satisfy and discharge the current expenses necessarily incurred by the said Company in the transaction of its business and for the making of repairs, improvements and betterments upon its properties and for that purpose all of the undersigned have signed a note or notes as indorsers or sureties to better secure persons who advanced money to it, the said Coal company, for the purposes aforesaid.

That upon to-wit: the 7th day of December, A. D. 1907, the present Board of Directors of the said Coal Company did authorize and direct the proper officers of the said Coal Company to execute a certain mortgage or trust deed in the name of it, the said Coal Company, for the purpose of securing the payment of said sums of money which had been loaned and advanced to said Coal Company and that said mortgage or trust deed has

been made and executed to James A. McClure of Blue Mound, Illinois, as trustee, to secure the payment of the sum of Twenty-six Thousand One Hundred and Sixty-two and 74-100 Dollars ($26,162.74.)

That inasmuch as there is some doubt and question as to the

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real market value of the said corporation on account of the present financial stringency, this indenture is made to witness a certain collateral agreement between the undersigned persons and J. W. Brown & Co. of Blue Mound, Illinois, the said Brown & Company being the holders of said notes above referred to and hereinafter specified, to the end that all of said notes hereinafter specified shall be held collateral to the said mortgage or trust deed executed to the said James A. McClure, trustee, as aforesaid, and that in case of the sale of the assets and property of the said corporation, and that thereby a deficiency arising after the sale thereof so that said corporation is unable to pay, satisfy and discharge all legal debts, claims and obligations, against it, that then the liability of the said indorsers of said notes shall remain notwithstanding the execution and delivery of the said mortgage or trust deed to said James A. McClure, trustee, as aforesaid.

Now, therefore, this indenture further witnesseth that the undersigned, R. Kreher, H. L. Ferguson, E. W. Crow, William Pistorius and J. W. Brown & Company heretofore, to-wit: on the 1st day of August A. D. 1906, executed a certain note for the sum of Four Thousand Dollars ($4,000.00), said note is still due and unpaid, together with accrued interest thereon in the sum of Three Hundred and Seventy-five and 67-100 Dollars ($375.67), making a total liability of Four Thousand Three Hundred

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and Seventy-five and 67-100 Dollars, ($4,375.67) on account thereof, and that also upon the same date the said last named persons executed another certain note for the sum of Four Thousand Dollars ($4,000.00) and that the same is still due and unpaid, together with accrued interest thereon in the sum of Three Hundred and Seventy-five and 67-100 ($375.67), making a total liability of Four Thousand Three Hundred and Seventy-five and 67-100 ($4,375.67) on account thereof; that also

on the 8th day of May, A. D. 1906, the said Blue Mound Coal Company by J. A. Brown, President, and L. R. Shick, Secretary, executed a certain note in the sum of Four Thousand Dollars ($4,000.00), which was indorsed by J. W. Brown, J. A. Brown, C. H. Moomey, E. W. Crow, R. Kreher, H. L. Ferguson, William Pistorius and D. L. Gage; that said note is still due and unpaid, together with accrued interest thereon in the sum of Three Hundred and Forty-four and 56-100 Dollars ($344.56), making a total liability on account thereof of Four Thousand Three Hundred and Forty-four and 56-100 Dollars ($4,344.56); that also upon the 10th day of September, A. D. 1906, the Blue Mound Coal Company executed its certain note for the sum of Four Thousand Dollars ($4,000), which said note was indorsed by J. W. Brown, J. A. Brown, H. L. Ferguson, E. W. Crow, C. H. Moomey, R. Kreher, D. L. Gage and William Pistorius and said note is still due and unpaid, together with interest thereon in the sum of Ninety-one and 78-100 Dollars ($91.78)

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making a total liability on account thereof of Four Thousand and Ninety-one and 78-100 Dollars ($4,091.78); that all of said notes are now held by the banking firm of J. W. Brown and Company, and that each of the undersigned persons do hereby renew their obligations as indorsers upon said notes according to the tenor and effect thereof, but they do agree jointly and severally that in case there be a deficiency judgment in the sale of the assets and property of the said corporation, to-wit: the Blue Mound Coal Company, that each of said parties will bear his proportionate loss of the said deficiency as his liability may now appear upon the said foregoing notes, that is, that the said Blue Mound Coal Company is liable for all of said indebtedness, but the said several respective parties whose names are signed hereto shall be held liable in case of a deficiency arising after a foreclosure and sale of the said mortgage or after a private sale thereof, and that said J. W. Brown & Company in consideration of the execution to said James A. McClure, as trustee, of the said mortgage, does hereby agree and covenant to retain said notes as collateral security for the payment of the sums of money mentioned and specified in said notes."

For a number of years prior to the date of these notes, J. W. Brown & Co., a co-partnership, consisting of

J. W. Brown and J. A. Brown

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was engaged in operating a private bank in the village of Blue Mound in Macon, County, Illinois. One James A. McClure was in their employ as cashier. For a number of years also prior to such time there was a corporation known as the Blue Mound Coal Company, engaged in the business of mining and selling coal in the village of Blue Mound. J. W. Brown and J. A. Brown were largely interested as stockholders in said company, J. A. Brown being president of said company.

All of the property of the Coal Company was included in a trust deed securing $40,000.00 of its bonds, which was held by J. A. Brown,

All of the parties whose names appear either upon the face or the back of any of the notes above referred to were stockholders and directors in said company. The evidence abundantly shows that J. A. Brown exercised a controlling influence in the conduct and management of the Coal Company until he finally became the owner of all of its property by bidding the same in upon the foreclosure sale of the same under the aforesaid trust deed, securing the $40,000.00 issue of its bonds held by him. The evidence fairly shows that he contemplated and desired before, or at least at the time of the giving of the notes marked defendant's Exhibits 2, 3, 4, 5, 6 and 7, the acquiring of the ownership of said properties, believing that the same were reasonably worth as much, if not more than the amount, of all the liabilities of said Coal

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Company. While there is much conflict in the evidence, as is not unusual in so large a volume of testimony as was taken, it seems clear that the firm of J. W. Brown & Co., had assumed the financing of the affairs of the Coal Company.

The minutes of the directors' meeting of the Coal Company do not seem to have been preserved. These minutes might have assisted materially in clearing up some matters which are left in doubt, but the record justifies the asumption, that the money furnished by the parties who either signed or endorsed the notes involved in this case, did so at the solicitation of J. A. Brown, acting in his capacity as a member of the private banking firm

of J. W. Brown & Co., because it is clear that none of these parties individually ever became or were indebted to said Coal Company, and whatever liabilities they did apparently incur to said J. W. Brown & Company, were incurred after the firm had extended the credit therefor to the Coal Company. In other words, the parties only assumed their said obligations as accommodation makers at the solicitation of J. A. Brown, whose firm had assumed the financing of the affairs of the Coal Company.

The bill is for an injunction to restrain an action at law brought by said assignees against appellee's intestate to recover upon said notes known as Exhibits 2 to7 inclusive. It is clear that if

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J. W. Brown & Co., could not have recovered upon the notes, their assignees could not do so, as they held the same subject to any and all existing equities between the original parties thereto.

A bill for an injunction will not lie to enjoin the prosecution of a suit at law when the complainant therein has a complete and adequate remedy at law; that is, where he can plead and maintain his defense in the action at law. A court of equity will, however, entertain jurisdiction, especially when it is not questioned, when the remedy at law is doubtful or incomplete by reason of the same involving complicated accounts or incidental questions, which have a bearing upon the ultimate rights of the parties and when all the questions involved can be determined and the rights of all parties most advantageously or expeditiously adjusted in equity. This case has about it circumstances which apparently justify a court of equity in assuming jurisdiction, especially in view of the fact that none of the parties have interposed any objection to the matters being adjusted in a court of equity, but have both sought its jurisdiction and much expense has been made to present the issues thus formed, and especially since the defendants have filed a cross bill wherein they specificially invoke the jurisdiction of the court of equity to obtain affirmative relief apparently germane to the substance of the original bill. It, therefore, would

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seem that justice to all concerned will be best subserved by passing over the technical question as to whether, strictly speaking, the relief sought by the ori-

ginal bill is clearly within the jurisdiction of a court of equity, and decide the case upon its merits.

The ultimate question then for the determination of this court is whether or not appellee's intestate, in equity and good conscience should be held liable upon the notes in question.

A court of equity will look to the substance rather than to the form of a transaction in reaching a determination of material questions involved, and so far as necessary to meet that end, will cast aside matters of mere form. It, therefore, may be said, that what legal definition might be most apetly applied to the character in which appellee's intestate signed his name to or upon the various notes in question, if the question was presented under different circumstances and in a different forum, is a matter of no great consequence, it being of controlling importance, that when he did so append his signature to or upon the same, he did so purely without any valuable consideration by him received.

In an action upon any of these notes, Exhibits 2 to7, inclusive, by J. W. Brown & Company against appellee's intestate, it is clear he could have established a complete defense. The notes were accomoda

tion paper. They were procured to be executed by J. A. Brown for J. W. Brown & Company, to enable or assist them in furnishing funds for the Coal Company. This conclusion is supported by numerous facts and circumstances in the record. Ex. "E" was an accomodation note given by Moomey to Brown & Company, payable to the Milikin National Bank. Ex. "D" was made to indemnify Moomey for executing Ex. "E". Moomey never received any benefit from the execution of either of these notes. His execution of Ex. "E" was purely that of an accommodation maker, and Ex. "D" was given for no other purpose than to protect or indemnify Moomey in his liability upon Ex. "E". Ex. "E" was paid to the bank by Brown & Company, and all liability thereon extinguished. The action of the parties in giving Exhibits "A", "B" and "C" was in effect the same as the giving of Ex. "D", by Moomey. And the giving of Exhibits 2, 3, 4, 5, 6 and 7 was to accomplish the same purpose anticipated by Exhibits "A ", "B", "C" and "D", except that there was included in the later transaction, notes covering the over-draft of

the Coal Company to J. W. Brown & Co.

Ex. 15 has somewhat confused the action of the parties. A literal construction of the instrument shows certain inconsistencies in its terms and also discloses some inconsistency between some of its terms and the legal effect of Exhibits "A", "B", "C" and "E". The trust

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deed or mortgage mentioned in Ex. 15 was never executed. Taking into consideration, however, all the facts and circumstances it would seem that Ex. 15 was intended to evidence an intention of the parties to restrict their ultimate liability upon the indebtedness apparantly shown by the notes to J. W. Brown & Company. Exhibits "A", "B", "C" and "E", when given, were accommodation paper. Their legal effect, when construed with Ex. 15, may have been intentionally changed, but if so, the change was based upon an expressed condition without the happenings of which, their original liability remained unimpaired. The giving of Exhibits 2 to 7, inclusive, irrespective of when they were executed, whether contemporaneously with Ex. 15, or otherwise, were substitutes for Exhibits "A", "B", "C" and "E", and their legal effect should be construed as if they were a part of the transaction represented by Ex. 15. It cannot be contended that the parties contemplated that Exhibits 2 to 7, inclusive, should be paid by them at all events. The facts and circumstances in the record forbid such conclusion.

We think it was the real intention of all of the parties, that if it became necessary eventually, in order to collect the supposed indebtedness represented by the trust deed for $26,162.74, and a foreclosure thereof was had, and after a sale there should be a deficit ex-

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isting, that then so much of said notes should be paid as would liquidate such deficit, the same to be ratably proportioned among the several parties according to the amounts for which they were apparently liable; or, if after a private sale of said property, a deficit should result after the application of the proceeds of said sale to said indebtedness, the same would be paid as above stated. It is not clear that appellee's intestate knew but what the trust deed referred to in Ex. 15, in fact existed. The parties to the supposed trust deed were J. W. Brown & Co., and the officers of the Coal Company. It not ap-

pearing affirmatively that appellee's intestate had knowledge of the fact that no such instrument existed, it should be assumed that he supposed the same did exist, and that he executed Ex. 15 under the assumption that the writing spoke the truth, and that the conditions expressed in the writing were essential elements thereof, and were intended to be complied with.

If Ex. 15 has any significance in this case, it is, at most, only an acknowledgement of an additional, but conditional liability thereby assumed by appellee's intestate and those similarly situated with him. It does not seem to have been the object and intention of Appellee's intestate to have assumed a new or different status and a different or additional liability or burden not therefore imposed upon him, when he executed Exhibit 15, with the privilege therein left open to J. A. Brown to acquire the property of the Coal Company by

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immediately foreclosing the trust deed securing the $40,000.00 issue of bonds and by bidding the property in for the face of the decree rendered in such foreclosure. If such were the intention of the parties, the whole transaction was a useless and idle performance..

The record justifies the conclusion that the object sought by J. W. Brown & Company, as appellee's intestate must reasonably have been lead to suppose, was to acquire the properties of the Coal Company if he could do so for the amount of its obligations then outstanding. All of the parties knew that J. W. Brown & Co., had assumed the financing of the Coal Company. They were informed that J. A. Brown desired to acquire the ownership of the property and they knew that he considered its assets at least equal to its liabilities. He subsequently did obtain an option to become the purchaser of all of its stock, and it seems that it would be most inequitable after appellee's intestate and the others similarly situated had executed the various notes in question, under the circumstances above shown, to hold them liable to pay the same to J. W. Brown & Co., or their assignees, when J. A. Brown had procured the property of the Coal Company by bidding the same in for the face of the decree at his own foreclosure sale.

J. A. Brown having procured the property in the manner above shown, he clearly could not maintain an

action at law himself upon these notes against appellee's intestate. He evidently was aware of this, as

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there is no intimation in the record that either he or his firm ever sought to collect them or use them in any way, and it was not until after the assignment was made, that a collection thereof was contemplated. As. before stated, if J. W. Brown & Co., could not have collected the notes, his assignees could not do so.

Various deductions may be drawn from the testimony in the record upon certain branches of this case and various arguments may be advanced which might lead to different conclusions, but when the whole case is considered in the light of the surrounding facts and circumstances, the relationship of the parties, their motives, actions and conduct throughout the period of time embraced in the transactions, equity and good conscience should forbid a recovery upon the notes against appellee's intestate by the assignees of J. W. Brown & Company.

It is therfore our conclusion that the equities of this cause are with the appellee and that a decree should have been entered according to the prayer of the original bill and that the cross bill should have been dismissed at the costs of the cross complainant.

The decree of the court below will, therefore, be reversed with directions to the court below to enter a decree perpetually enjoining the prosecution of the said suit at law upon the said notes and dismissing the cross bill at the costs of the cross complainants.

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Gen. No. 6641. April Term A. D. 1917. Ag. No. 2.

People of the State of Illinois, ex rel J. Fay Cusick, Appellant.

vs.

City of Chrisman, Appellee.

Appeal from Circuit Court Edgar County.

ELDREDGE, J.

This is an appeal from a judgment in favor of appellee rendered in the Circuit Court of Edgar County in an action of mandamus. It is averred in the petition in substance, that the relator, J. Fay Cusick, is a resident of the city of Chrisman and owner of certain real estate located therein; that the village of Chrisman before it became a city laid out, built and maintained a storm drain tile along a certain course in said village and emptied into a ditch along the right of way of the C. I. & W. R. R. Co.; that said attempt to drain was so negligently done on account of improper grading of the tile, the size of the same and the attempt to carry water out of its natural course that said drain failed to carry the ordinary and usual annual rainfall; that the city of Chrisman, since its incorporation as such, has maintained said tile and had full charge of the same; that about 1907 the city caused to be cleaned and graded the open

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ditch along said right of way, but has allowed said ditch to become so filled with weeds, dirt, etc., that it fails to carry its usual amount of water and thus tends to overload said tile; that the city has permitted other drainage to be joined to said tile and by means of ditches also brings water to the same as a further tax upon it; that it has caused or permitted open ditches to be made across said streets in the attempt to drain the surface water over said tile and left the same open as obstructions to travel thereon; that it has caused and permitted the building of a high rock road on another street which has caused water to collect in a pool over said tile which is a menace to travel, etc.; that it has permitted said tile to become stopped up in some manner so that it failed to carry off water, and in consequence, the same is backed up into the cellars of abutting owners and upon the property of the relator to his damage; wherefore, the relator prays a writ of mandamus be directed

to the City, the members of the city council and mayor thereof commanding them to rebuild said tile with tile of proper size, laying the same properly and cleaning out the same and to clean out the gutter and the ditch along the right of way, etc.

The city filed its answer wherein it denies that the Village built said tile or that it dug said ditch along said right of way, and denies that it negligently permitted it to become filled up; denies

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making open ditches across said streets and avers that said tile was put in in the early days of the village and served its purpose at that time, but since territory and population have increased and water works installed, to reconstruct the old drain would furnish drainage for only a limited number of citizens and be an inadequate drainage, would cost $3,000 and be a hardship on the tax payers of Chrisman, a waste of funds and unnecessary, as the city, through its Board of Local Improvements, are proceeding under the act of 1897 to construct a system of drainage for the city, to be paid for by special assessmant; that on May 8, 1916, the resolution was passed by the Board of Local Improvements adopting a system of drainage for the city and that at the meeting of the Board on May 18, 1916, for consideration of the resolution, it was adhered to and adopted and the ordinance for the same was passed on June 5, 1916, providing for said system to be paid for by special assessment; that the mayor has appointed an assessor, who is making the roll, and is expected to complete the same with out delay and present the same to the County Court so that the contract may be let and the work completed that year.

A replication was filed to the answer but the fact that the city was proceeding by special assessment to construct a complete sewer system for the city is not denied therein.

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There is some evidence tending to show that the Village constructed the drain tile but there is no evidence tending to show that it constructed the ditch along the right of way of the railroad company, the evidence shows that the ditch was constructed by the railroad company. There is no evidence tending to show

that the cellars of neighboring houses have been flooded or that there has been any excessive flooding of the streets on account of the defective condition of the tile. The evidence in support of the petition is very meager and unsatisfactory and far from sufficient to warrant the issuance of the peremtory writ fo mandamus. It seems superfluous to reiterate that a writ of mandamus is not a writ of absolute right. The granting of the writ will be controlled in each particular case by the judicial discretion of the court even where a clear legal right for the same may appear. It will not be granted where the consequenc of such action will not promote substantial justice. People vs. Board of Supervisors, 185 Ill. 288; People vs. Olson 215 Ill. 620; People vs. Ketchun, 72 Ill. 212.

In view of the fact that the city was proceeding under the local improvement law to construct a complete system of drainage in the city, it would be a useless act and needless extravagance to reconstruct this

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old tile drain and open ditch even if the evidence had been sufficient to sustain the petition. The court wisely exercised its discretion and properly denied the writ. The judgment of the Circuit Court is affirmed.

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Gen. No. 6659. April Term A. D. 1917. Ag. No.5.

PEARL ECKELS, Appellee,

vs.

JOHN POCORRA, Appellant.

Appeal from Circuit Court Sangamon County.

ELDREDGE, J.

Pearl Eckels, appellee, recovered a judgment against John Pocorra, appellee, and James E. Gash for the sum of $200 in an action on the case for malicious prosecution. The case was tried upon a declaration consisting of two ammended counts. In the first count it is averred that the defendant, James E. Gash wickedly and maliciously contriving to injure plaintiff without reasonable cause, aided, asisted and encouraged the defendant John Pocorra, in the arrest and malicious prosecution of plaintiff on the charge of stealing $15.00 etc. The second count is substantially the same except it is averred therein that said defendant John Pocorra did wickedly and maliciously aid, encourage and assist the said James Gash in the arrest and prosecution of the plaintiff without probable cause, etc. The defendant John Pocorra alone appeals.

On January 2, 1916 John Pocorra kept a small grocery store and

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meat market in the city of Springfield. Pearl Eckels and her husband resided in the neighborhood of the store and had been his customers for two or three months. James E. Gash also resided in the neighborhood and was a customer of Pocorra's. On the morning of the day in question, which was on a Sunday, a number of people were trading in Pocorra's store and the latter with his clerk were busy waiting on his customers. James E. Gash had sent his son, a boy twelve years old, to the store to pay his grocery bill. Pearl Eckels was also in the store at the time. Suddenly the Gash boy cried out that he had lost $15.00 which his father had given him to pay the grocery bill. All the customers immediately began looking for the money but failed to find it. Some of the witnesses testified that Pearl Eckels immediately left the store, while she herself and another witness testified that she remained and helped in the search for the money. After she had left the store there was some evidence that Pocorra said, "That damned Pearl Eckels stole that money." This Pocorra denies and several other witnesses

testified that he made no such statement. Pocorra testified that what he did say was, that when he asked about the trouble, the boy made the statement that Pearl Eckels had taken his money. After the search of the store failed to disclose the money,

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Pocorra sent for James E. Gash to come to his store. Gash came to the store and after talking with the boy and some others went to Pearl Eckels' house and asked her to return the $15.00 which she had taken from the boy. She denied that she had the money and walked back to the store with Gash and the evidence shows that Pocorra said nothing to her at this time. Gash subsequently filed his complaint with the Justice of the Peace charging her for the larceny of the $15.00. She was arrested and admitted to bail but Gash never appeared against her and the complaint was dismissed for want of prosecution. Before this suit was tried, Gash and his family had left Springfield and he made no defense.

Appellee has filed no brief or argument in this court and for that reason the judgment might be reversed **pro forma** under the rules of this court but we have decided to consider the case upon the merits. We have carefully considered the evidence in this case and fail to see how the judgment can be allowed to stand. Appellant did not cause the arrest of appellee nor did he appear against her, nor, so far as we have been able to find from the evidence, did he advise Gash to have her arrested. The burden was upon appellee to prove that appellant either caused her arrest for the offense charged, or aided and abetted it in some way with malice and without probable cause. The evidence does not

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fairly tend to show any of these facts as against appellant. Both Mrs. Eckels and Gash were customers of his and he had no interest in the matter whatever, and the proof wholly fails to show any motive on his part for maliciously and without probable cause procuring Mrs. Eckels to be arrested and prosecuted for stealing the $15.00.

The judgment is reversed and the cause remanded.

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Gen. No. 6691. April Term A. D. 1917. Ag. No. 14.

R. E. GARRETT and A. G. JOHNSON,
Plaintiffs in Error,

vs.

C. B. SPANG, ASA W. SAWIN and ANNA M. SWAIN, Defendants in Error.

Error to the Circuit Court Vermilion County.

ELDREDGE, J.

C. B. Spang, on September 16, 1914, filed his bill to foreclose a mortgage executed by Asa W. Sawin and Anna M. Sawin, his wife, and dated December 23, 1912 to secure their promisory note of even date therewith for the principal sum of $1,500 with interest at the rate of seven per cent per annum.

It is averred in the bill that said Asa W. Sawin and Anna M. Sawin, his wife, subsequent to the date of said mortgage, conveyed the real estate mentioned therein to R. E. Garrett and A. G. Johnson and that by the terms of said conveyance, said Garrett and Johnson agreed to pay said mortgage indebtedness.

Garrett and Johnson were made parties defendant to the bill and were duly served but were defaulted for want of appearance or answer. On October 10, 1914, at the October Term 1914, a decree was entered finding the amount due upon the note to be $1763.70 and it was ordered

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that said sum be paid within twenty days from said date by all the defendants, in default of which said premises to be sold by a Special Master in Chancery. On November 20, 1914, the Special Master filed his report of sale in which he reported that he sold the property to C. E. Spang for $1,400, leaving a deficiency of $411.32. On Nov. 20, 1914, the report of sale was approved and a judgment for this deficiency was decreed against the defendants including Garrett and Johnson. On December 29, 1914 Garrett and Johnson made a motion to vacate and set aside the judgment and execution. On January 2, 1915 the court adjourned for the term. The next term, being the January Term 1915, was adjourned on the twenty-eighth day of April, 1915. The next term, being the May term 1915, was adjourned on the twenty-eight day of September, 1915. The next term, being the October term, 1915, was adjourned on the

fifteenth day of January, 1916. At the next term, being the January term, 1916, on the eleventh day of March 1916, plaintiffs in error called up their motion to vacate and set aside said deficiency judgment for hearing before the court, when it was denied. Both Johnson and Garrett filed affidavits in support of their joint motion but presented no answers therewith. It has been

repeatedly held that a motion to set aside a decree entered by default is addressed to the sound legal discretion of the court and unless it appears that such discretion has been wrongfully and oppressively exercised, this court on appeal will not interfer, and that when an answer does not accompany the motion it is not an abuse of such discretion to overrule the motion. Burge vs. Burge 88 Ill. 164 and case cited therein. Also, plaintiffs in error did not have the court pass upon their motion for nearly two years after it was made. Under these circumstances the court did not abuse its discretion in overruling the motion. The order of the Circuit Court will be affirmed.

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Gen. No. 6694. April Term A. D. 1917. Ag. No. 17.

THE PEOPLE OF THE STATE OF ILLINIOS,
Defendants in Error.

vs.

JOHN A. PHARES, Plaintiff in Error.

Error to County Court DeWitt County.

208 I.A. 28

ELDREDGE, J.

Plaintiff in error was convicted in the County Court of DeWitt County upon four counts of an information, the first three of which charged him with unlawfully selling intoxicating liquors in the town of Clintonia in the County of DeWitt, while the same was anti-saloon territory; and the fourth, with keeping a common nuisance in said town while the same was anti-saloon territory.

The first error presented is that the court allowed an improper examination of five prospective jurors by the State's Attorney. The questions objected to first stated the law substantially in the language of the statute and then asked the juror in substance if he would recognize that principal of law, if under the evidence this was proven a proper case in which to apply that law. We can see no serious objections to these questions, and no showing was made that any of the jurors

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was predjudiced thereby or that the peremptory challenges allowed to plaintiff in error had been exhausted when the questions were asked.

It is urged also that the court erred in restricting the cross-examination of some of the witnesses. Several witnesses were asked on cross-examination by the plaintiff in error whether they ordered or bought the beer from the latter. The court properly sustained the objections to these questions as they called for conclusions of fact, which it was the duty of the jury to determine from all the evidence.

The principal contention is that the evidence does not warrant the conviction. Plaintiff in error, before the town of Clintonia became anti-saloon territory, conducted a saloon in the city of Clinton which is located in said township. At that time the Terre Haute Brewing Company owned a building which it used for the storage of beer. After the town became anti-saloon territory,

plaintiff in error under the name of "Phares Transfer & Storage Company" used this building for the ostensible purpose of carrying on a transfer business and garage. In this building he had an office in which he kept blank printed order forms, delivered to him by the Terre Haute Brewing

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Company. These forms were addressed to the Terre Haute Brewing Company, Bloomington, Illinois, and directed it to ship to the Phares Transfer & Storage Company, Clinton, Illinois the beer ordered, and were to be signed by the purchaser. The proofs show that sometimes the purchaser filled out the order blanks and sometimes plaintiff in error filled them out; that sometimes the payments for the beer were made to plaintiff in error in cash and sometimes by check, payable to his order; that the beer was always shipped to plaintiff in error and delivered by him to the purchaser and that plaintiff in error collected the empty cases or barrels, as the case might be, from the purchaser and returned them to the Brewing Company. Section 12 of the Local Option Law provides in part as follows: "Whoever shall by himself for another, either as principal, clerk or servant, directly or indirectly sell, barter or exchange any intoxicating liquor in any quanity whatever within the limits of any political subdivision or district in this state, while the same is anti-saloon territory, shall be fined, etc." Section 13 provides: "The giving away or delivery of any intoxicating liquors for the purpose of evading any provision of this act, or the taking of orders or the making of agreements, at or within any political subdivision or district while the same is anti-saloon territory,

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for the sale or delivery of any intoxicating liquor, or other shift or device to evade any provision of this act, shall be held to be an unlawful selling." The construction of Section 13 has been settled by the Supreme Court in the case of People vs. Steinhauer, 248 Ill. 46, wherein it was held that the taking of an order or the making of an agreement in anti-saloon territory for the sale or delivery of any intoxicating liquors therein was an unlawful selling. Under the rule therein announced and the facts in this case, plaintiff in error was

clearly guilty.

There was no reverseable error in the giving and refusing of the instructions and the judgment must be affirmed.

Gen. No. 6700. April Term A. D. 1917. Ag. No. 23.

NORA EDWARDS, Appellant.

vs.

RUTH PRUST, Appellee.

208 I.A. 30

Appeal from Circuit Court Clark County

ELDREDGE, J.

Appellant sued appellee in an action to recover for injuries to her horse which had been loaned to appellee by appellant's son. On the first trial a judgment was rendered in favor of appellee which was reversed by this court and the cause remanded for another trial for the reasons stated in the opinion, Edwards vs. Prust 201, Ill. App. 399. The judgment rendered on the second trial from which this appeal was prosecuted was also in favor of appellee. The evidence for appellee tended to show that the horse was loaned to her by Clayborn Edwards, son of appellant, for the purpose of going on an errand; that she returned the horse to Clayborn Edwards, who, after adjusting the riding blanket, permitted another girl to ride on it and it was while the latter was riding on the horse that it fell and received the injury. As we held in our former opinion, whether Clayborn Edwards was the agent of his mother and had a right to loan the horse and

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receive it back from appellee and to turn it over to the other girl, were questions of fact for the jury to determine. There was evidence tending to support such agency and authority, and we cannot say that the verdict is contrary thereto. While some of the instructions are faulty and subject to the critisisms made, yet taking them as a series the jury could not have been misled as to the law governing the issues presented, and as two juries have found the facts adversely to appellant, the judgment is affirmed.

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Gen. No. 6706. April Term A. D. 1917. Ag. No. 29.

CLARA PURTLE, Appellee.

vs.

HARRY CALDWELL, Appellant.

Appeal from County Court Fulton County.

ELDREDGE, J.

This is an action of assumpsit brought by appellee against appellant to recover for services performed by appellee in caring for the mother of appellant at the request of the latter, from February 1912 to February 1916. Appellant's mother resided in the Village of Bryant in Fulton County, and was seventy years old when the alleged contract is purported to have been made. Appellee lived in the same Village with her husband, near the home of Mrs. Caldwell, while appellant resided about twelve miles distant in the city of Canton. The decaration consists of the common counts only. Appellee testified that some time in February, 1912 appellant requested her to look after and take care of his mother and stated that he would pay her $3.00 per week therefor. Appellant denies that he ever promised to pay her $3.00 per week for such services or that he ever requestedd her to take care of his mother. The evidence is abundant that appellee did

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in fact go to the home of Mrs. Caldwell substantially every day, made the beds, did her washing, ran her errands, cut the wood, cleaned house, got her groceries, brought in the coal, nursed her while she was sick, called the doctor and performed like services during the period named. The evidence also is uncontradicted that appellant, at different times, paid her small sums, amounting in all to $46.00. She recovered a judgment for the sum of $387.00.

Appellee testified to an express contract wherein appellant agreed to pay her $3.00 per week for said services. Appellant flatly denied that he ever made such promise. While there was evidence of other witnesses that appellant requested her to take care of his mother and said he would pay her for so doing, there was no evidence whatever as to what her services were reasonably worth. The court gave a number of instructions for appellee which in subsance stated that even if the jury

believed from the evidence that no definate amount was agreed upon, yet, appellant would be liable to pay appellee a reasonable compensation for such services so performed. If there had been any evidence tending to show what her services were reasonably worth, these instructions would have been proper under the evidence in this case but the express contract having been denied by appellant, these instructions

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gave the jury the right to fix the damages of the plaintiff according to its own notion as to what that should be without any evidence thereof on which to base its verdict. We cannot, without violating the plainest and most elementary principles of the law, do otherwise and reverse the judgment.

Judgment reversed and cause remanded.

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Gen. No. 6709. April Term A. D. 1917. Ag. No. 32.

STELLA M. McDONALD, Plaintiff in Error.

vs.

MYRTIE A. WATSON et al., Defendants in Error.

Writ of Error to Circuit Court Moultrie County.

ELDREDGE, J.

This is a writ of error to the Circuit Court of Moultrie County to review the decree of that court for the alleged error in failing to include Walter C. Hoffman, Cecil Preston and Victor Preston, defendants in error, in a deficiency decree entered July 18, 1916 in a suit brought by the plaintiff in error against all the defendants in error to foreclose a mortgage upon certain real estate.

It is averred in the original bill that on September 10, 1912 Myrtie A. Watson and Avory Watson, her husband executed the said note and mortgage to J. R. Bean and that said Bean afterwards assigned them in blank to the plaintiff in error; that afterwards on September 11, 1913 the said Watson executed a warranty deed of said premises to said Hoffman for a consideration of $5,000, in which it was recited that the deed was subject to a mortgage of $3,225, payable to Bean, a copy of said deed being attached to the bill marked exhibit

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"C", and made a part thereof; that Hoffman accepted said deed and went into possession of the premises "and assumed the payment of the mortgage indebtedness against the said premises and paid one of the coupon notes representing the interest on said mortgage to your oratrix whereby the said Walter C. Hoffman became liable for the payment of said mortgage note and the interest coupons attached thereto;" that said Hoffman and his wife on July 12, 1915 made a pretended conveyance of said premises by warranty deed to Cecil Preston subject to the said mortgage which said warranty deed "the said Cecil Preston accepted and agreed to assume said mortgage and thereby also became liable for the payment of said mortgage notes;" a copy of said deed being atached to the bill marked exhibit "D" and made a part thereof.

An amendment to the bill was subsequently filed in which it was further averred that three days after the filing of the original bill, said Cecil Preston and his wife made a pretended deed of conveyance of the premises to

Victor Preston in which deed it was recited that it was made subject to said mortgage, and that said Victor Preston accepted said deed "and agreed to assume said note and mortgage and interest and thereby became liable jointly with the defendants, Myrtie A. Watson, Avory Watson, J. R. Bean, Walter C. Hoffman and Cecil Preston for

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payment of said notes and mortgage."

The prayer of the bill asks that in case the mortgaged premises do not sell for enough to settle the amount due, that a decree be rendered for the balance, and that an execution issue therefor against all the above named defendants.

All the defendants were personally served and defaulted and a decree **pro confesso** entered and the cause was referred to the Master in Chancery who reported that there was due upon the mortgage and notes $3542.03 and that the fair cash value of the premises was $2,000 and that said Hoffman had paid one year's interest on the same. He also found that Hoffman, Cecil Preston and Victor Preston assumed the payment of the notes and mortgage and that if the amount of the sale should not be sufficient to pay the amount due with interest, costs and expenses, that Myrtie A. Watson, Avory Watson, J. R. Bean, Walter C. Hoffman, Cecil Preston and Victor Preston pay to the complainant the amount of the deficiency.

The premises were sold for $2,000 which left a deficiency of $1,756.43. The plaintiff in error presented a decree to the court providing for a deficiency judgment against all the above named defendants, and the defendants Hoffman, Cecil Preston and Victor Preston filed

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objections thereto. The court entered a decree finding that the defendants Hoffman, Cecil Preston and Victor Preston are not personally liable for said deficiency and that the defendants Myrtie A. Watson, Avory Watson and J. R. Bean are liable to the complainant therefor.

Plaintiff in error seeks to invoke the rule that a defendant being in default and a decree **pro confesso** having been entered against him, is precluded from questioning the competency or sufficiency of the evidence to support the decree. This rule obtains where the allegations of the bill are sufficient to sustain the decree. Roby vs.

Chicago Tile & Trust Co. 194 Ill. 232; Williams vs Williams 221 Ill. 541.

But the mere acceptance of a deed subject to an outstanding mortgage specified therein, creates no personal liability on the grantee to pay the mortgage. Crawford vs. Nimmons 180 Ill. 143. A decree **pro confesso** concludes the defendants as to matters of fact alleged in the bill, but does not conclude them as to any conclusions of law averred therein and such a decree may be atacked after its rendition, by appeal or writ of error on the ground that the allegations in the bill do not sustain it. James H. Rice Co. vs. McJohn 244 Ill. 264; Monarch Brewing Co vs. Wolford 179 Ill. 252.

The averments in the bill and its amendment that Hoffman and the Prestons respectfully assumed the payment of this mortgage by their

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deeds are but conclusions of law as the copies of the deeds, which are made a part of the bill and the deeds themselves, which were introduced in evidence, conclusively show. There is nothing in either of the deeds which shows any assumption by the grantees therein of the payment of the mortgage indebtedness. There was no evidence before the Master which tended to prove any contractual obligation of Hoffman or the Prestons to pay this mortgage indebtedness and neither the averments nor proof sustain the contention of plaintiff in error that they should be included in the deficiency decree.

The decree of the Circuit Court is affirmed.

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Gen. No. 6712. April Term A. D. 1917. Ag. No. 35.

ROBERT V. McALLISTER, Appellee,

vs.

ELMER ROBINSON, et al., Appellants.

Appeal from Circuit Court Coles County.

ELDREDGE, J.

Robert V. McAllister and Della Robinson are brother and sister and are each seized in fee as tenants in common of an undivided one half of eighty acres of land. Elmer Robinson, appellant, is the husband of Della Robinson and on March 1, 1913 entered into the possession of the land under an oral lease by which he was to have possession thereof for one year from March 1, 1913, and pay as rental, $400.00, and gave his note for $200.00 being one half of the rent, to McAllister. On March 1, 1914, he paid the note given for the rent for the year 1913 and executed another note for the rent for the year 1914, and a similar transaction occurred between the parties on March 1, 1915. On March 1, 1916, McAllister refused to again lease the land to Robinson for the same rental and finally three persons were chosen as arbitrators to fix the amount of rent which Robinson should pay for the year beginning March 1, 1916 and ending March 1, 1917. The arbitrators met and determined that the rent should be for the year mentioned, $400.00, the

same as it had been for the previous years, and Robinson remained as a tenant with the agreed rental of $400.00 for the year ending March 1, 1917, and executed and delivered his promissory note in the sum of $200.00 to McAllister for the latter's share of said rent. At the January Term, 1917, of the Circuit Court of Coles County, McAllister filed his bill for partition of the premises, in which it is averred that the lease of said premises to Robinson would expire March 1, 1917. Robinson filed his answer stating that he was a tenant from year to year and that no written notice had been served upon him to quit and that he was entitled to the possession of said lands until March 1, 1918. The court in its decree found that the lease expired March 1, 1917 and Robinson was ordered to deliver up possession at that time.

The contention that the agreement between the

parties constituted a tenancy from year to year, cannot be sustained. A tenancy from year to year is created where the tenant is permitted to hold possession of land after the termination of his lease without any new agreement and without failing or refusing to pay the rent and who does not claim adversely to his landlord. Streit vs. Fay 230 Ill. 319. While it is true that the arbitrators fixed the rental for the year commenc

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ing March 1, 1916 at the same amount as appellant had paid during the previous years, yet the arbitration did not pretend to fix the rent for any other year, and the rent was for a definite period which expired March 1, 1917. The answer of appellant Robinson was filed in January, 1917 before the year had expired. Section 12, chapter 80, R. S. provides as follows: "When the tenancy is for a certain period and the term expires by the terms of the lease, the tenant is then bound to surrender possession, and no notice to quit or demand for possession is necessary."

The last lease was a special contract for the year terminating March 1, 1917 having a rental of $400.00 and appellant Robinson was in duty bound to deliver up possession at that time without a notice to quit.

A further contention that, because appellant's wife admitted in her testimony that her husband was a tenant from year to year of her undivided half in said premises, such admission is binding upon appellee, is without merit. Both appellant and his wife alleged in their respective answers that he was a tenant from year to year of the whole premises. No such issue was raised by the answer and we cannot consider it here.

The decree of the Circuit Court is affirmed.

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Gen. No. 6715. April Term A. D. 1917. Ag. No. 38.

ARTHUR LEHMAN & CO. et al., Appellees.

vs.

THOMAS SLAT and ANTONIGA SLAT, Appellants.

208 I.A. 39

Appeal from Circuit Court Christian County.

ELDREDGE, J.

Appellees are judgment creditors of appellant Thomas Slat and this is an appeal from a decree rendered on a hearing on a creditor's bill filed by them for the purpose of subjecting certain real estate purchased in the name of Antoniga Slat, the wife of Thomas Slat, to the executions of their respective judgments on the ground that said deed was made for the purpose of defrauding the creditors of the latter.

Thomas Slat, before coming to Christian County, had been a coal miner and butcher in West Virginia and Pennsylvania and also claims that his wife at the same time ran a boarding house from the earnings of which she had acumulated $1,592. In October, 1915 Thomas Slat came to the village of Bulpit in Christian County, and bought out the saloon stock of one Payne for the sum of $600.00 He paid $20.00 down to bind the bargain and then he and Payne went to the offices of one Sittler,

an attorney at law in Taylorville, and also the local agent for F. Reisch & Brothers, one of the complainants. The evidence shows that Slat there exhibited a pass book on a Pennsylvania bank, payable to himself only, showing an account to his credit for $600.00. He also there exhibited a certificate of deposit on a Pennsylvania bank payable to himself for the sum of $1,592.00. Upon his assurance that these credits were his, Sittler then advanced to him the purchase money necessary to pay the balance on the purchase price of the saloon stock, and Slat turned over to Sittler, as security therefor, the said certificate of deposit. Sittler also collected at that time as the agent for F. Reisch & Brothers one month's rent for the saloon building which was owned by said F. Reisch & Brothers. Afterwards Slat returned and paid Sittler the money advanced by him and took up the certificate of deposit. Slat carried the certificate of deposit about with him on his person, and, on the advice of Sittler, finally decided to leave it in Sittler's safe. In February, 1916

Slat had an interview with Sittler in which the purchase of a certain lot in the Village by Slat, was discussed. In this interview Slat assured Sittler that the money was his own and that he had worked hard in earning it. Slat did not make a success in the saloon business and subsequently borrowed $100.00 from Sittler, and the

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latter held the certificate of deposit as collateral security for the loan. When Slat paid this loan he again took the certificate of deposit back into his possession. Sittler informed the appellees, F. Reisch & Brothers, William Rigby, and Arthur Lehman & Co., of this certificate of deposit, by reason of which they extended credit to Slat for beer and liquors ordered by him. The other complainant, Epstein & Co., produced no witnesses at the trial and it is uncertain whether it had any knowledge of the certificate of deposit. The evidence tends to show that the indebtedness of the judgment creditors accured before May 20, 1916, on which date Slat having deposited the certificate of deposit to his own credit in the Bank of Bulpit, purchased the lot in question for the sum of $1,700, and a warranty deed was executed conveying the lot to his wife, Antoniga Slat. As part payment for the lot, Slat bought a draft in his own name for $1,500 from the Bank of Bulpit which was paid to the grantor in the deed. On May 29, Reisch & Brothers brought suit against Thomas Slat to recover $90.00 as rent for the saloon building, and procured judgment therefor on June 3. William Rigby recovered a judgment against Slat for $130.00 on July 6. Both of these judgments were obtained before Justices of the Peace. On July 5, 1916, in the Circuit Court of Christian County,

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Arthur Lehman & Co. obtained a judgment against Slat for $325.00. William Rigby obtained a like judgment for $261.18 and another judgment for $~~271.25~~ 130.00; and Epstein & Co., a judgment in the sum of $271.25. The deed to Antoniga Slat bears a purported consideration of $500.00, but the uncontroverted evidence is that the real consideration therefor was $1,700.00. Executions were issued on all the judgments and returned **nulla bona.**

As to the judgments procured before the Justices of the Peace, they were sufficient to sustain a creditor's

bill. Steer vs. Hoagland 39 Ill. 264; Valentine vs Beal 3 Scan. 204.

The principal contention of appellants is that the money represented by the certificate of deposit amounting to $1,592.00, was the actual property of the wife earned by her in keeping the boarding house and that she but permitted her husband to take care of it for her. Since the act of 1869 the earnings of a wife realized from keeping boarders with the consent of her husband will be considered her own personal property and protected from subsequent creditors of her husband. Bowan vs. Ash 143 Ill. 649. But there are exceptions to this rule, one of which is where the wife permits her husband to hold title to her property knowing that he is engaged in a mercantile business and in the constant purchase

of goods. Under such facts it has been held that in law she consents that he may obtain credit from his apparent ownership. Hawk vs. VanIngen 196 Ill. 20. In the latter case the following doctrine was cited with approval: "A claim by a wife against a husband first put in writing, when his liabilities begin to jeopardize his future, should always be regarded with watchful suspicion, and when attempting to be asserted against creditors upon the evidence of the parties alone, uncorroborated by other proof, should be refused at once, unless their statements are so full and convincing, as to make the fairness and justness of the claim manifest." Where the wife permits her husband to use her property as his own in his business, she cannot interpose her claim thereto as against his creditors. Hockett vs. Bailey 86 Ill. 75; Keady vs. White 168 Ill. 76; Smith vs. Willard 174 Ill. 543. That Antoniga Slat permitted her husband to use this certificate of deposit as his own property and that he did so use it for the purpose of obtaining credit in his saloon business, there can be no question and the purchase of the lot in question in the wife's name, under the circumstances shown by the proofs, was a fraud upon his creditors.

The court dismissed the bill as to Epstein & Co. on the ground that there was no proof that the latter knew of this certificate of

deposit and therefore could not have relied thereon, and was subjected to no injury by the transaction. We do not think this position can be sustained. While it is true the proofs do not show that Epstein & Co. had any personal knowledge of the certificate of deposit, yet Slat, by means of this certificate of deposit, procured credit from the other complainants, by reason of which he was able to stock his saloon with merchandise which unquestionably gave him a false credit with Epstein & Co. and others with whom he dealt. If the purchase of the lot in question in his wife's name was a fraud as to one creditor, it was a fraud as to all. Epstein & Co. have assigned cross errors as to that part of the decree which dismissed the bill as to them. As to these cross errors the decree is reversed at the costs of appellants and the cause is remanded with directions to grant the same relief to Epstein & Co. as to the other judgment creditors.

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Gen. No. 6733. April Term A. D. 1917. Ag. No. 53.

WILLIAM C. HOOD, Appellant

vs.

GEORGE B. CHRISTIE, Appellee

208 I.A. 51

Appeal from Circuit Court Schuyler County.

ELDREDGE, J.

In the year 1897, appellant and appellee entered into a written agreement wherein it is recited that, whereas, Christie, appellant, Lowe, and others are the owners of about six thousand acres of swamp land in Schuyler County, and whereas it is the intention of a majority of said owners to reclaim the same by the construction of levees, ditches, etc., and whereas Hood, appellant had conveyed to Christie and Lowe a certain fifteen acres of land therein described, therefore, in consideration of said conveyance, Christie and Lowe agree that in case a drainage district shall be organized, they will pay for said Hood or his heirs all assessments which may be levied against any lands now owned by Hood; and if such work shall be done by mutual consent of the owners without the organization of a drainage district, they will pay the proportionate share or shares of said Hood which may be charged to any lands in said territory now owned by him; provided, however, that this agreement

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to pay such assessments or proportionate share of said Hood shall not be construed as a covenant running with said lands, but is hereby made expressly personal to said Hood and his heirs.

Thereafter the Cole creek drainage and levee district was organized for the purpose of draining and reclaiming said lands and the lands of Hood were included in the district. On July 24, 1914, Hood conveyed by warranty deed, to Oscar Hood all his lands located in the drainage district and at the time of such conveyance there was levied against said lands assessments amounting to $193.07. On March 25, 1916, Oscar Hood reconveyed to appellant, said lands by quit claim deed. Subsequent to the last mentioned conveyance another assessment was levied against said lands amounting to $101.65. Appellee refused to pay either one of these assessments and appellant was compelled to pay them. This suit is

brought to recover from appellee the amount of both assessments amounting to $294.72. The case was heard before the court without a jury and the facts were stipulated as above. The court held that appellee was liable under the contract for the assessment of $193.07, which was levied prior to the execution of the warranty deed by appellant to Oscar Hood. The court further held that appellant could not recover for the last assessment of $101.65, levied after the execution

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of said warranty deed. In other words, the court held that appellee is not liable for the payment of any assessments levied on said lands after the execution of said warranty deed on July 29, 1914, but is liable for all assessments levied before the execution of such deed. Lowe was not served and appellant prosecutes this appeal, claiming that under the written agreement apellee was bound to pay all assessments subsequent to the execution of the warranty deed by him, and appellee has filed cross errors claiming that the court erred in finding that he was liable for the assessment levied prior to the execution of the warranty deed.

Appellee defends on the ground that appellee having divested himself of the title to said lands by the execution of the warranty deed to Oscar Hood, thereby also divested himself of all rights under the contract, while appellant claims that as he has bought the land back and is now again the owner of it, the contract is again in full force and effect, and he is entitled to the benefit of it. The intention of the parties to the contract we think is clear when the language used therein is carefully considered. It is apparent from the contract itself that appellant did not want his lands brought into the drainage district and in order to save himself from the payment of assessments

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thereon, in case they were brought into said district, he conveyed to Christie and Lowe, the fifteen acres mentioned in consideration that they would pay all assessments levied upon said lands for him or his heirs. The language of the contract is as follows: "Now therefore, in consideration of said conveyance, the undersigned hereby agree to and with the said William C. Hood, that in case said levee and drainage district shall be or-

ganized, they will pay **for** the said Hood and his heirs all assessments which may be levied by said district against any lands now owned by said William C. Hood; and if such shall be done by the mutual consent of the owners, and without the organization of the district, the undersigned will pay the proportionate share or shares, of the said William C. Hood, which may be changeable to any lands in said territory now owned by him; provided, however, **that this agreement to pay such assessments or proportionate shares of the said Hood shall not be construed as a covenant running with his lands, but is hereby made expressly personal to said Hood and his heirs."** It is expressly stated in the contract that Christie and Lowe shall pay "for" Hood, or his "heirs" all assessments on said lands and that such agreement shall not be construed as a covenant running with the land but shall be **personal** to Hood and his heirs. There can be but one meaning to these words and that is, that so long as said lands were

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owned by Hood or his heirs, Christie and Lowe would pay all assessments levied against them by the drainage district. At the time Hood conveyed the land to Oscar Hood, there was an assessment levied against the same which was unpaid and which it was the duty of Christie and Lowe to have paid under the contract, and appellant undoubtedly had the right to recover for the same. But after he had conveyed the lands no duty devolved upon Christie and Lowe to pay any subsequent assessments thereon "for" him for the reason that he was not obligated thereafter to pay any of the assessments, and no longer had any personal interest in the contract. Having once divested himself of all personal interest in the contract, can he reinvest himself with the same by a subsequent repurchase of the lands? We do not believe that any such situation was ever contemplated by the parties to the agreement and it certainly is not embraced by any of the terms thereof. As long as he or his heirs retained title to the lands, Christie and Lowe were in duty bound to pay the assessments levied against the same, but when he, by his own act, divested himself of all personal interest in the contract, it terminated and it could not again be revived by a subsequent repurchase of the lands. Taylor vs Hampton 17 Am. Dec. 715.

The judgment of the Circuit Court is affirmed.

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Gen. No. 6743. April Term A. D. 1917. Ag. No. 59.

MILFORD MARTIN, by Otis F. Glenn, his Guardian and Next Friend, Appellant.

vs.

MATTOON JOURNAL COMPANY, Appellee.

Appeal from Circuit Court Coles County.

ELDREDGE, J.

Appellee published in the Mattoon Journal, a newspaper published in the city of Mattoon, Illinois, the following article: "A son of Mrs. James H. Martin, the woman who was murdered by the negro, DeBerry, at Murphysboro, has applied for and been granted permission to spring the trap which will send the murderer to his death. This is a perverted idea of revenge, which should not be countenanced by civilization, and places the young man on a plane little higher, if any, than that of the murderer."

Appellant brought his suit to recover damages on the ground that the above article was libelous. The amended declaration consists of three counts and a demurrer to each count was sustained by the trial court. The principal contention in this court is that the article above quoted is not libelous and the demurrer to the amended declaration was sustained by the trial court upon that ground.

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Libel has been defined many times in various ways by the courts of this and other states. The definition thereof, as contained in the criminal code in this state is as follow; "A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury." In the case of People vs. Fuller, 238 Ill. 116, it is said, "Under the statute any malicious defamation tending to impeach the honesty, integrity, virtue or reputation of another, and thereby to expose him to public hatred, contempt, ridicule, or financial injury, is a liable. It is not necessary that it should amount to a charge of crime. * * * The estab-

lished rule in this state is that the words in an action of libel must be taken in the sense which the readers of common and reasonable understanding would ascribe to them,—that is, in their ordinary or common acceptation. (Nelson vs. Borchenius, 52 Ill. 236; Barnes vs. Hamon, 71 Id. 609; Ranson vs. McCurley 142 Id. 626.) All the words in the article are to be considered, and when they are all considered together, the question is, how would they be understood by men of common and reasonable understanding?" Insin-

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uations may be as defamatory as direct assertions, since the effect and tendancy of the language used, and not its form, is the criterion. The imputation may be inferred from odious comparison. 25 Cyc. 360; Starkie on Slander, 58; Waters vs Jones, 29 Am. Dec. 261; Crocker vs. Hadley, 102 Ind. 416; Putnam vs. Browne, (Wis.), 155 N. W. 911. The demurrer admits the publication of the alleged libelous matter and that the words were false and published maliciously. Adaire vs. Timblin, 186 Ill. App. 137; Gustin vs. Evening Press Co., 172 Mich. 311; Cerveny vs. Chicago Daily News, 139 Ill. 354. The demurrer also admits the meaning supplied by the inuendo. Belkap vs. Ball, 83, Mich. 583.

The declaration avers that the plaintiff, Milford Martin was a minor and the only son of Elizabeth Martin, who resided in the city of Murphysboro, Illinois; that said Elizabeth Martin was, on July 30, 1915, murdered by a negro, Joe DeBerry, at her home in Murphysboro, the said DeBerry breaking and fracturing both of the arms of said Elizabeth Martin with an iron poker, and then and there beating her upon the face and head and fracturing and crushing her skull and beating out a portion of her brains and otherwise in a most malicious, brutal and depraved manner inflicting grievous and mortal injuries upon her

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from which she died; that said DeBerry was at the time of the committing of the grievances by appellee herein complained of, a most wicked, depraved, vicious, immoral and vile person, a liar, burglar, thief, convict, and a murderer, and was so known to be by a great and large number of the neighbors of the plaintiff and by a great many citizens of the cities of Mat-

toon and Murphysboro, and of the Counties of Cole and Jackson; and throughout the state of Illinois, and the United States of America; that by publishing the false, malicious, scandalous and defamatory libel, appellant meant and intended to charge that the plaintiff, Milford Martin was little, if any, better than a most wicked, depraved, vicious, and vile person, and but little if any, better than a liar, burgular, convict, and a most brutal murderer; that is to say, but little better, if any, than DeBerry, the murderer of the mother of the plaintiff. The declaration further avers that by means of the said several grievances by the defendant, the plaintiff has been and is greatly injured in his good name, credit, and reputation and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons and has been and is otherwise injured, etc.

The declaration in other words sets out the details of the horrible crime of the murder of his mother by DeBerry and states that the facts,

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concerning which, were known by the citizens of the city of Murphysboro and throughout the State of Illinois and that DeBerry was known by the people throughout the territory mentioned, as the charcter of person described in the declaration. The words in the publication, "and places the young man on a plane little higher, if any, than that of the murderer" charges in fact that the character of appellant is substantially no better than that of the convict, thief, and murderer, DeBerry. Few charges could be made against a person which could be more atrocious in their character, than those contained in the article in question, which appellee admits by the demurrer were false and maliciously made.

The judgment of the Circuit Court is reversed and the cause is remanded with directions to overrule the demurrer to the declaration.

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Gen. No. 6762. **April Term A. D. 1917.** **Ag. No. 77**

In the Matter of the Estate of CHARLES MOREFIELD, Deceased; NELLIE HILTON and STELLA PORTER,

Appellees,

vs.

JOHN MOREFIELD, Administrator, Appellant.

Appeal from Circuit Court Christian County.

ELDREDGE, J.

On July 12, 1914, John Morefield, appellant, and his father, Charles Morefield, as surety, executed their promisory note for the principal sum of $131.50, payable to the order of H. N. Schuyler State Bank, Pana, Illinois, due six months after date with interest at the rate of six percent per anum. In December 1914, Charles Morefield died, testate, leaving Jane Morefield, his widow, and John Morefield, Harry Morefield, Nellie Hilton, and Stella Porter, his children and only heirs, devissees and legatees. The note not having been paid by John Morefield when due, Jane Morefield, as executrix of the last will and testament of Charles Morefield, deceased, paid the note on March 6, 1915. It appears that Jane Morefield shortly thereafter died, and John Morefield was appointed administrator with the will annexed

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of said estate. Upon his filing his final report as such administrator in the County Court of Christian County, Nellie Hilton and Stella Porter filed their objections thereto based upon the fact that appellant had not charged himself in the report with the amount of said note. The objections were sustained and upon appeal to the Circuit Court were again sustained. It is claimed by appellant, in excuse for not charging himself for the amount of the note, that his his mother promised to pay it for him and in fact did so. The receipt given by the bank shows that she paid the note as executrix of the last will of her husband. The transcript of the record before us does not contain the will nor is there anything in the stipulation of facts to show what disposition of the property was made by the will and neither does the record purport to contain all the evidence heard upon the objections. There is no competent evidence in the record to support appellant's

contention that his mother promised to pay his debt and make him a gift of the sum so paid, and there is no evidence of any kind tending to show that she had a right to use the funds of the estate of her husband to do this. It is possible that, by the terms of the will of the deceased, all his property was devised and bequeathed to his wife

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and she would thus have had a right to do what she pleased with it, but if this were true this controversy could not have arisen in this estate. However, we have no means of knowing what the contents of the will were and under the state of the record, the judgment of the Circuit Court must be affirmed.

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Gen. No. 6701. April Term 1917. Ag. No. 24.

THOMAS B. JACK, Appellee,

vs.

A. L. McCONKEY, T. E. McCONKEY and RYLAND B. SHAW.

RYLAND B. SHAW, Appellant.

RYLAND B. SHAW, Appellant.

vs.

THOMAS B. JACK, A. L. McCONKEY and T. E. McCONKEY, Appellees.

Appeal from Macon.

Statement.

Thomas B. Jack filed a bill of interpleader to the October Term, 1912, of the Macon County Circuit Court against A. L. McConkey and Ryland B. Shaw, alleging that in August 1911, said McConkey and Shaw entered into a contract for the exchange of certain lands under which McConkey agreed to sell and cause to be conveyed to Shaw certain lands in Adams County, Illinois, and to furnish Shaw an abstract showing a merchantable title and that Shaw agreed to assign to McConkey two described master's certificates of purchase, and that as a part of the exchange contract the said certificates of purchase were deposited with complainant pending the acceptance of the said abstract of title; that Shaw refused to accept the said abstract of title and demands that complainant surrender to him said certificates of purchase, while McConkey demands that the certifcates of purchase be delivered to him under the exchange contract and that complainant has no interest

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and is neutral in the matter. The prayer is that the defendants may adjust their claims between themselves or that the court may adjudicate their rights. The bill was subsequently amended by making T. E. McConkey a party and alleging that he claimed to be the owner of the certificates of purchase.

By agreement of the parties Jack was appointed receiver to take title to the property described in the certificates and collect the rents pending a final decree.

The record does not show that he, as receiver, had made any report prior to the entering of the decree.

The defendants answered the bill each setting up their respective claims and Shaw filed a cross bill against Jack, A. L. McConkey and Thomas E. McConkey.

The cross bill alleges that on July 13, Shaw and A. L. McConkey executed a contract in writing in which A. L. McConkey agreed to sell to Shaw a half section of land containing 320 acres more or less in Adams County, Illinois, subject to encumbrances of not exceeding $11,000, and the taxes for 1911, in exchange for one domino factory and 200 acres of land in Marion County, Illinois, subject to mortgages amounting to $4300, and two mortgages one for $3350 and one for $700 on lots in the city of Decatur and a red automobile; that the contract provided that the land is subject to the inspection of the respective parties and if either

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was not satisfied the contract should be void; that on July 14, the parties with one, Titus Springer went to Adams County, and after an examination of the land and the pointing out of the boundaries by A. L. McConkey, the parties endorsed on the contract their acceptance of it; that said Springer was the owner of the 200 acre tract of land in Marion County; that T. E. McConkey was the owner of the 320 acre tract of land in Adams County; that at the time of the execution of the contract it was agreed that A. L. McConkey should furnish an abstract of the Adams County land showing a good merchantable title and that Shaw should furnish an abstract of the Marion County land; that an abstract of the Marion County land was furnished to McConkey and found to be satisfactory; that abstracts were furnished of the Adams County land but the same did not show a merchantable title to said land; that the contract of July 13, was written by Titus Springer and owing to his lack of legal knowledge it did not represent the true contract and that the mortgage for $3350 and that for $700 were owned by complainant Shaw, but were in process of foreclosure and complainant Shaw held a certificate of purchase under one, and the 'her was sold on July 14, 1911, under a decree of court; that on August 9, 1911, Shaw delivered to A. L. McConkey

a deed executed by Springer conveying to Thomas E. McConkey the Marion County land subject to an encumbrance of $4300, which the grantee assumed and A. L. McConkey

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delivered to Shaw a deed for the Adams County land and it was then agreed that the two certificates of purchase should be delivered to Thomas B. Jack in escrow until the title to the Adams County lands were asseptable to Shaw; that on August 9, the domino factory and red automobile were delivered to A. L. McConkey; that the encumbrances on the Adams County land are $14,000; that a strip of land 200 feet wide had been appropriated for levee purposes across said Adams County land; that when your complainant examined the Adams County land A. L. McConkey pointed out the corner stones and informed complainant that only three acres of said land were west of the dyke and subject to overflow and complainant relied on said representation but has since learned that there are 28 acres west of the dyke and such land is worthless but would have been worth $100 an acre if it was on the east side of the dyke so that complainant has been damaged $5000; that McConkey refused to record the deed of the Marion County land and the mortgage thereon has been foreclosed and it is not possible to rescind the contract and place the parties in statu quo. The bill prays that McConkey may be decreed to perfect the title to the Adams County land and to pay damages because of the misrepresentation as to the amount of land outside the levee.

Thomas B. Jack answered disclaiming any interest in the matters in controversy.

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The McConkeys answered the cross bill admitting the making of the contract of July 13, and its approval; denying the other allegations of the cross bill and asserting that they never assumed to pay the mortgages on the Marion County land, that the assumpsit clause in the said deed of the Marion County land was inserted contrary to the agreement, that they refused to accept the deed with said clause and that Springer had conveyed said lands to third parties. The answer also states that Shaw does not wish to rescind said contract but is in possession of said Adams County land farming it and

asserts that said Jack should convey the lots described in the certificates of purchase to T. E. McConkey and denies that cross complainant is entitled to any relief. Replications were filed and the cause was referred to the Master to report the evidence with his conclusions.

The Master reported that Thomas E. Jack should be decreed to deed the property covered by the certificates of purchase to T. E. McConkey and to turn over all rents collected by him and that the contract did not provide that McConkey should furnish any abstract but that he did furnish an abstract which was not satisfactory and that Shaw had accepted the deed to said Adams county land and taken possession of it and is not entitled to any damages. The cause was heard by the court on exceptions of complainant and a decree entered finding that the defendant A. L.

McConkey had pretended to point out the corners of the Adams County land and that the true corner was 180 feet west of the corner as pointed out by McConkey and that 10.9 acres west of the levee that were supposed to be within the levee would have been worth $22.60 per acre more if they had been within the levee and complainant is entitled to recover $244.16 damages therefor and also $12.50 paid for rent of the domino factory with interest at 5 percent per annum from July 14, 1911, making the total sum due $320.-66; that the parties did not agree to furnish an abstract but the parties were bound to furnish a merchantable title, but that the objections made to the title to the Adams County land were immaterial; that the title to the lots in Decatur should be transferred by Thomas B. Jack to T. E. McConkey, and that each of the parties should pay one half the costs.

The decree adjudged that A. L. McConkey pay to R. B. Shaw within 30 days the sum of $320.66 in full settlement and that Shaw execute a receipt therefor to McConkey; that Jack make a report as receiver and then to pay the net sum remaining in his hands to T. E. McConkey on presentation of a receipt for $320.66 from R. B. Shaw, and that in the event of the failure of McConkey to pay Shaw $320.66 and one half the costs, then that the Master sell said lots or so much thereof as is

necessary to pay Shaw $320.66 and interest thereon, and one half the

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costs and that the deeds from Jack be not delivered until the said judgment and half the costs be paid, and that Ryland B. Shaw pay one half the costs and that Jack is entitled to recover $35 as and for his solicitor's fees to be taxed as costs. Shaw appeals from the decree.

Opinion by THOMPSON, J.

This litigation is between two agents of land traders Neither party to the contract owned the land they were trading. Shaw owned a red automobile, a domino factory and two certificates of purchase which arose out of the foreclosure of mortgages on lots in the city of Decatur. One, Springer, owned an equity in 200 acres of land in Marion County, subject to two mortgages amounting to $4300. T. E. McConkey was the owner of an equity in a half section of land in Adams County subject to certain encumbrances, which the contract states do not exceed $11,000.00. A. L. McConkey was the agent of T. E. McConkey to trade the land and he executed the contract in his own name. A law firm, of which Thomas B. Jack was a member, appears to have been the attorney of Shaw up to the time of the beginning of this suit. The mortgage covering one of the propertits was for $3350. A foreclosure suit had been begun on this mortgage and a sale had been made under a decree thereon in April 1911, three months before the contract for the trade was made; the other mortgage was for $700 and this mortgage was being foreclosed and the sale was

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advertised for July 14, the day the parties approved the contract. These mortgages covered 21 lots in the city of Decatur on which were three small houses.

The principal contentions of appellant are that McConkey, in showing Shaw the Adams County land, fraudulently misrepresented the location of the land and that Shaw, relying on the location of the land as pointed out by McConkey, was deceived and led to believe that only three acres of land were not protected by the levee, while as appellant insists 28 acres were outside of the levee and subject to overflow and that the court erred

in computing the amount of damages; that the court erred in holding the contract was in writing and that appellees did not agree to furnish an abstract showing a merchantable title to the Adams County land; that the court should have held that the abstract did not show a merchantable title to said land, and that the court erred in assessing half the costs against appellant.

It is agreed that Shaw, Springer and McConkey did visit the Adams County land on July 14th, and that they talked about the amount of land within the levee and west of it, and that McConkey showed them where the levee was and stated the amount of land outside of it. Where a vendor undertakes to point out the boundaries of land to a purchaser he is obliged to point them out correctly. The evidence shows there was

outside the levee more land than was at that time estimated. Appellant had a right to rely on the representation of appellee, and the court did not err in finding that appellant was entitled to damages because of the misrepresentation of appellee.

There was no agreed price per acre at which the land was taken. It was a trade in which the parties made their own estimates of values. The measure of damages, where there is an exchange of properties, and the property is not as represented and the representation was relied upon, is the difference between the actual value of the land and what would have been its value if it had been as represented. Drew vs. Beall, 62 Ill. 164; Antle vs. Sexton, 137 Ill. 410.

The original contract was in writing. It does not contain any provision as to abstracts or titles futher than concerns the amount of the encumbrances against the respective properties. Appellees contend that the deed made by Springer conveying the 200 acres in Marion County to McConkey was not accepted because appellant had inserted a clause under which the grantee assumed the payment of the encumbrances on the land. They explicitely deny making any subsequent oral contract and we see no reason for finding that the trial court did not properly find the fact that the entire contract was in writing.

Appellant's contention that the title to the Adams county land

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is not merchantable is based on the fact that deeds in the chain of title, one made in 1847 and another in 1859, were not joined in by the wives of the grantors. "While a purchaser cannot be compelled to take a doubtful title he will not be permitted to the title on account of a bare possibility that it will prove defective." Attebery vs. Blair, 244 Ill. 363. While there are flaws in the title they are such bare possibilities, that a purchaser, who has accepted a conveyance 60 years subsequent to the making of the deeds which are claimed to be imperfect, because not joined in by wives, and taken possession of the land, may not be heard to complain. He must rely on the covenants of his deed after he has undertaken to carry out the contract.

It is also insisted that the court erred in taxing half the costs against appellant. The appellant has failed in several of his contentions on which much evidence was taken. There is no reason why he should not pay the costs in those matters. In chancery the costs are in the judicial discretion of the court. There was no error in the ruling that appellant should pay half the costs.

Appellant also has assigned for error that the court erred in decreeing that the receiver should pay over all the net rents collected by him to T. E. McConkey. Appellant has neither made any argument on this assignment nor pointed out in what the error consists or what would

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have been the proper order. The record does not show either that the receiver ever made any report or that he had collected any rent. The decree of the court orders A. L. McConkey to pay the $320.66 to Shaw and orders the receiver to pay any rents he may have collected to T. E. McConkey on the presentation of a receipt from Shaw for the $320.66. This court should not search for errors which counsel do not point out or argue.

Appellees, McConkeys, have assigned cross errors and argue that the court erred in assessing damages and costs against A. L. McConkey. The assignments have been disposed of by what has been said regarding the assignments of appellant.

There is no reversible error in the case and the decree is affirmed.

Affirmed.

Gen. No. 6708. April Term 1917. Ag. No. 31.

M. B. Voorhees, Administrator of the estate of Lillian Ryan, deceased, Plaintiff in Error.

vs.

Chicago and Alton R. R. Co., Defendant in Error

Error to Jersey.

208 I.A. 96

Per Curiam:

This is a companion case to Gen. No. 6707. The deceased in this case was a sister of Stuart Ryan, was three years of age and was killed in the same accident. What was said in that case is applicable to this. The judgment is Reversed and the Cause Remanded.

Reversed and Remanded.

Gen. No. 6737. April Term 1917. Ag. No. 57.

MARY M. MALONEY, Admr. of the Estate of H. K. Maloney, Deceased, Appellee,

vs.

CLEVELAND, CINCINNATI, CHICAGO and ST. LOUIS RAILWAY COMPANY, Appellant.

208 I.A. 101

Appeal from Clark.

Opinion by THOMPSON, J.

This is an action begun by Mary A. Maloney, administrator of the estate of H. K. Maloney, deceased, against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company to recover damages resulting to the means of support of the next of kin resulting from the death of H. K. Maloney, caused by his being struck by a passenger train of defendant at a crossing known as the Chicago Road crossing in Clark county, on September 17, 1915. A trial resulted in a verdict and judgment against the defendant for $1500.00. The defendant prosecutes this appeal.

The amended declaration, on which the case was tried, was filed in November 1916, and contains five counts. The negligence alleged in the first and second counts is the failure to give either of the statutory crossing signals; in the third the negligence alleged is excessive speed. The fourth and fifth charge general negligence in running the train. The defendant filed pleas of the general isue on which issue

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was joined and the statute of limitations. A demurrer was sustained to the special plea and a trial had on the issue joined. The defendant, at the close of plaintiff's evidence, and again at the close of all the evidence, requested a peremptory instruction which the trial court refused. In the view this court takes of the facts, as disclosed by the evidence, it is not necessary to discuss the legal questions argued.

The evidence shows that appellant's railway intersects a public highway known as the Chicago road at a point about three miles north of the city of Marshall, which is on the west side of the railway. The highway runs north and south. The railway crosses the highway at a very acute angle running slightly west of north and east of south without any curve and substantially at grade. The deceased, a farmer, had lived some three

years, three miles northeast of the crossing and made frequent trips to Marshall, usually traveling the Chicago Road in going to and from Marshall; before going to reside on the farm he had lived in Marshall for several years. There was a slight depression on the east side of the railroad on the right of way a few feet north of the plank crossing. After a rain, water stood in this depression and travelers on the highway avoided this mud hole by driving over next to the ties of the railroad. This mud hole did not cause any trouble except that travellers avoided it to keep their vehicles from getting muddy. The

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deceased was going home in a one horse buggy from a street fair in Marshall about four o'clock in the morning, when he was struck and killed by a south bound passenger train on the plank crossing before he had reached the depression. The fireman of the train died between the time of the accident and the trial. No person appears to have seen the accident. The engineer did not know that anything had happened until his train was brought to a stop about three fourths of a mile past the crossing by the brakes being automatically set by the breaking of the air line on the train. The air pipe was broken by part of the derbis of the buggy catching a plank at a private crossing a quarter of a mile south of the place of the accident. The horse was found about 50 feet south of the crossing with its left flank torn off and the body of the deceased was found about 100 feet south of the crossing on the east side of the track. Parts of the buggy were found on the front of the engine with parts of two broken whiskey bottles. There was a smell of whiskey also on the front of the engine.

The evidence shows that the deceased was in Marshall from about 10 o'clock of the evening before the accident and at that time he had a quart bottle half full of whiskey in his buggy and asked the city marshall to drink with him. The evidence also shows that he was more or less intoxicated about one o'clock in the morning. The evidence

(Page 3)

does not disclose his whereabouts from one o'clock up to the time he was killed, further than that he had during that time driven from Marshall to the place of

the accident. There was no obstruction of any kind to prevent a traveller, going north along the public highway, from seeing a train approaching from the north after a traveller got within 75 or 80 feet of the crossing. Beynod that point there were some bushes on the west side, off the right of way, that obstructed the view to some extent. The headlight on the engine was burning as it approached the crossing. The evidence is in conflict as to whether the statutory signals were given but the great preponderance of the evidence is that the signals were given. The angle at which the highway crosses the railway is so acute that the deceased could not help seeing the light of the approaching train unless he was either intoxicated or asleep. The judgment will be reversed with a finding of fact, that the deceased was not in the exercise of ordinary care for his own safety prior to and at the time he was killed.

Reversed.

Gen. No. 6759. April Term 1917. Ag.69.

WILLIAM J. HALL, Appellee,

vs.

Chicago & Alton Railroad Company,

Appellant.

Appeal from Tazwell

Opinion by THOMPSON, J.

Appellant prosecutes this appeal to reverse a judgment entered against it for $2300 in an action for personal injuries sustained by appellee in May 1910. This is the second appeal by appellant of this case to this court. The opinion on the former appeal from a judgment for $2500 appears in 188 Ill. App. at page 95 and states the pleadings and the general facts as shown by the evidence, which are substantially the same as in this appeal and it is unnecessary to restate them. On this trial, the fourth before a jury, a verdict was returned in favor of plaintiff for $4250. The trial court on a motion for a new trial directed a remititur down to $2300, which was entered and judgment entered for that amount.

The appellant has argued on this appeal, as on the former one, that the evidence neither shows that the injured was in the exercise of due care nor that the defendant was guilty of the negligence alleged. This court held that under the evidence these questions were properly

(Page 1)

submitted to a jury and that under the showing the Appellate Court should not interfere with the findings on those questions since a verdict in favor of appellee was not manifestly against the weight of the evidence. The evidence on this appeal not being different from that on the former trial, the former decision of this court is res adjudicata on those questions.

It is argued that the court improperly sustained an objection to the question asked appellee on his cross examination:—"You understood it was your duty to get in the clear when a train came by didn't you?" The objection was that it was not proper cross examination. The question stated a fact so obvious that the sustaining of the objection could not prejudice appellant.

The witness was testifying concerning what he knew about the motions of this particular train, and not as to trains in general or his knowledge of his duty at other times. While the question should have been answered

there was no prejudicial error in the ruling.

A doctor, who examined appellee several times after the injury, was asked the question:—Assuming that plaintiff had received a blow on the head and prior to that time he did not have headaches and soon after the injury he had frequent and recurring headaches, have you an opinion based on your knowledge of medicine and practice of your

(Page 2)

profesion and your examination of the plaintiff what was the cause of those headaches? He answered the question, "Yes." "Due to the injury." The question was then asked:—"What injury do you mean? "The headaches, his hesitancy of speech, loss of memory was undoubtedly due to the injury to the skull." The defendant moved that the answer be stricken "as not responsive to any pending question." Counsel for appellant say it was manifest error not to strike this voluntary statement because appellee does not claim that his speech was in any way affected or that he suffered from loss of memory. The motion to strike should have been confined to the objectionable matter. (FitzSimmons &Connell Co. vs. Braun, 199 Ill. 390) The answer being in part proper and the motion being to strike the entire answer it was properly denied.

Appellant sought to show in mitigation of damages that appellee lost time in the fall of 1909, that he was absent 5 days and that appellee gave as a reason for not working that he was not feeling well. In rebuttal of this evidence appellee stated that he had to lay off to be with his wife, who was pregnant, and that the child was born November 16, 1909. Appellant had proved that appellee was a married man with a family. That proof having been made by appellant it was not prejudicial for appellee to show the real reason he was absent from work.

Appellant also contends that there was error in several instructions

(Page 3)

that were given. Three of the instructions objected to and criticised were given at the request of appellant and were given without modification as requested by it. It is rather anomalous for counsel to criticise their own instructions. The four other instructions which are criticised, it is claimed limit the exercise of due care on the part of the plaintiff to the time of the injury and do not require due care prior to the pre-

cise time of the accident. None of these instructions direct a verdict. An instruction given at the request of appellant informs the jury that if "the exercise of such ordinary care and prudence on his part for his own safety at and prior to the time he was injured would have avoided or escaped such injury," then he should not recover; another given at the request of appellant tells the jury that if they believe plaintiff failed to exercise ordinary care for his own safety "at and prior to the time of the injury, which failure proximately helped to bring about the accident," then you should find a verdict of not guilty. The instructions are given as a series and are the instructions of the court. The instructions given at the request of appellee do not limit the care required of appellee to the time of the accident, the language used is "Whether or not the plaintiff exercised ordinary care for his own safety at the time of the occurrence of the injury complained of." It is a strained construction to say that this

(Page 4)

only required due care at the instant he was struck; an ordinary person would understand it as covering the time and acts leading up to the injury which were all a part of the occurrence. When appellee's instructions are read with appellant's instructions, the jury could not fail to understand that "at the time of the occurrence" included the acts leading up to the accident.

Appellant also insists that the court erred in refusing to give instructions D and I requested by it. Instruction D instructs a verdict for the defendant on the theory that appellee assumed the risk of his employment. The instruction assumes to tell the jury that appellee assumed the risk of the negligence of appellant and should have been refused for that reason. The correct propositions of law contained in the instruction were given repeatedly in instructions 18 B, 11 A and 13 A, which were given at the request of appellant.

Instruction I particularly calls the attention of the jury to certain portions of the evidence and then tells the jury if they believe such parts of the evidence they should find for the defendant. The instruction undertakes to tell the jury that the things stated are contributory negligence without regard to the other evidence in the case. The jury must find whether the facts, as stated, constitute or are not contributory negligence.

There was no error in refusing these instructions.

(Page 5)

It is also contended that the judgment is excessive but two juries have returned verdicts larger than the judgment rendered. We cannot say it is so manifestly against the evidence that it cannot be sustained.

Finding no reversible error in the case the judgment will be affirmed.

Affirmed.

(Page 6)

d Oct 11, 1917

3478

Gen. No. 6764. April Term 1917. Ag. No. 78.

VALERIAN SIMPKUS, Appellee,

vs.

SUPERIOR COAL COMPANY, Appellant.

208 I.A. 104

Appeal from Macoupin.

Opinion by THOMPSON, J.

This is an appeal prosecuted by the Superior Coal Company from a judgmnet rendered against it for $5250 in favor of Valerian Simpkus for personal injuries sustained by him through the negligence of appellant. The appellee was a coal miner and as he was entering a cage, at the surface of the ground, that was used by appellant for lowering men into one of its mines, one of appellant's employees suddenly and without warning started the cage, which dropped down the shaft and caught appellee between the surface of the ground, the side of the shaft and the hood of the cage, crushing him and seriously injuring him.

Appellant concedes that it is liable for the damages sustained by appellee. The only questions of fact in the case are the nature and extent of the injuries sustained by appellee and the amount he is entitled to recover therefor.

The evidence shows that appellee at the time he was injured was 45 years of age; that by the accident his spine was fractured in the back of his neck in the region of the cervical vertebrae, and in the middle of his back. Two of his ribs were broken and he was also

(Page 1)

injured in the lumbar region. After the accident his urine contained considerable blood for three weeks, and for ten days it had to be drawn through a catheter; he spit blood for several months and was confined to his bed for several weeks and is still crippled because of the injuries sustained. Before the accident he was a strong healthy man weighing 195 pounds and at the time of the trial 15 months after the accident his weight was 145 pounds. Appellee testified that he had been unable to do any manual labor since the accident but there was also evidence tending to show that after four months he had done some work in a meat market. Appellee also testified that the injuries received had rendered him impo.

tent. The physicians who treated him testified that his injuries are permanent. Before he was injured his earnings were from $70 to $80 every two weeks and for 10 years he had not lost any time, when the mine was running. His physicians bills resulting from the injury amounted to over $500, and he had paid a hospital bill of $30.00.

It is insisted that the court erred in overruling objections made to questions put to expert witnesses and it is now contended that the questions put to the witnesses were improper for the reason they embodied the facts to be found by the jury. The question most seriously objected to is:—"Supposing a man" etc, describing the conditions shown

(Page 2)

by the evidence, gave you a history of not being able to copulate, what would you say as to whether his inability to copulate might be from the injuries you found? The question is hypothetical and leaves the jury to make the application to the case on trial. The question is somewhat suggestive and leading but that objection was not made. There was no error in the ruling of the court on the objection as made.

On the cross examination of an expert called by appellee, counsel for appellant asked the question:—"Taking the sensory nerve that comes from between the fifth and sixth lumbar, where would this nerve come from?" Ans. "It would come out of the sacrum, whether that would affect ones power to move his legs would depend on how hard he was injured, if one could run and move around like an ordinary individual it would not affect his leg at all unless the motor segment was involved. I have already said that I didn't know; it might or it might not be. I have no opinion stronger than it might be." Counsel then moved to exclude the opinion of the witness on the question of the sensory nerve and its effect on the body of the plaintiff. The evidence sought to be excluded was that adduced by appellant. Part of the answer was uncalled for but read in connection with the preceeding evidence of the witness there was no reversible error in the refusal to exclude the answer.

(Page 3)

The court gave four instructions at the request of appellant, the first of which informs the jury that if they believe, from the greater weight of the evidence, plain-

tiff was injured because of the negligence of defendant as alleged, then the jury should find the defendant not guilty; two of them inform the jury concerning the rule as to an impeached witness who is corroborated by other reliable evidence and the fourth instructs the jury concerning the measure of damages in this kind of a case. This latter instruction tells the jury they "should take into account so far as shown by the evidence, any loss of time * * * and from all the facts and circumstances in evidence fix the amount of such damages at such sum as will reasonably compensate plaintiff for such injury or injuries, if any, he is shown to have sustained." The court gave nine instructions requested by appellee which fully instructed the jury that the burden was on plaintiff to prove the nature and extent of his injuries complained of and that the jury "have no right to rely upon mere speculation or guess work;" "that before plaintiff can recover for any injury, pain or suffering, he must prove by a preponderance of all the evidence that such injury or pain and suffering directly resulted from being struck by the bonnet of the cage at the defendant's mine, and if you believe that the evidence is equally balanced or preponderates in favor of the defendant as to any one or

(Page 4)

more of the injuries or pain and suffering complained of, then in either of such events plaintiff would not be entitled to recover for such injury or pain and suffering;" "that in determining the weight to be given to the testimony of plaintiff they have the right to take into consideration the fact that he is the plaintiff and has a pecuniary or financial interest in the result of this suit;" "that if the jury believe the general reputation of plaintiff for truth and veracity is bad in the community where he resides, then you should take that fact into consideration in determining what degree of credit should be given his testimoy;" "that if you believe any witness has knowingly testified falsely," etc, "that if you believe from the evidence plaintiff did employ more doctors and thereby incur more expense than was reasonably necessary" he is not entitled to recover such unnecesary expense; that you should not be moved by passion, prejudice or sympathy either in weighing the evidence or arriving at a verdict. You should try the case with the same fair consideration "as though it were a

suit between a farmer and his hired man or a merchant and his clerk;" "that he is not entitled to recover for any lost wages which he could have earned at some other gainful occupation" and if you believe from the evidence "that since four months after he was injured the plaintiff worked in and about a meat market" you should

(Page 5)

take that fact into consideration in determining the amount of damages you may award.

The jury by appellee's fourth instruction should have been confined to a consideration of the evidence bearing on the question of damages, but there is nothing in that instruction that could mislead the jury. The objections to the instruction are that the words "as shown by the evidence" and the direction "to fix the amount of damages from all the facts and circumstances in evidence" and that there is no evidence that the sum of $30 paid for hospital expenses was reasonably necessary. These objections are of the most technical kind. The evidence showed that appellee was in St. Johns Hospital, at Springfield, five weeks and that he paid $30 hospital expenses. There was no objection to this evidence. Appellant may not raise the objection for the first time in this court that it was not shown that such expenses were necessary expenses. The instructions must be read as a series and the instructions given at the request of appellee directed the attention of the jury particularly to the strict rule of law in every matter of which complaint is made. There is no legal question in the case that requires its reversal. The meritorious question is whether the appellee was injured to the extent and the amount found by

(Page 6)

the jury. Appellant argues that appellee is a malingerer and that the verdict is excessive. It is not contended that the appellee was not seriously injured, he suffered much pain and is still more or less of a cripple, even the experts for appellant do not say he is not permanently injured. We think the verdict of the jury is sustained by the evidence. The judgment will be affirmed.

Affirmed.

(Page 7)

112 - 22535

208 I.A. 125

MYRTLE JOHNSON,

Defendant in Error,

vs.

T. WILLARD READY,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

Plaintiff in error, who will be referred to as defendant, seeks to reverse a judgment against him for $534.18, recovered by defendant in error, hereinafter referred to as plaintiff. From the record it appears that defendant was regularly served with process, a declaration was filed, default properly entered, a verdict of the jury was returned finding the defendant guilty and assessing plaintiff's damages at the sum already named, and judgment was thereupon entered on that verdict and assessment of damages.

As no bill of exceptions appears in the record filed in this court, and the judgment is within the ad damnum of the declaration, it is impossible for us to consider the suggestion that the judgment is excessive. Defendant contends, however, that the declaration failed to state a cause of action. We are unable to agree with this view, since the declaration set out clearly false and fraudulent representations made by the defendant known to him to be false and made for the purpose of inducing plaintiff to rely

No. 22832

MYRTLE JENKINS,

Defendant in Error,

vs.

T. WILLARD KRAY,

Plaintiff in Error.

ZONTA. 125

MEMO W

MUNICIPAL COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE CONNELY delivered the opinion of the court.

Plaintiff in error, who will be referred to as defendant, seeks to reverse a judgment against him for $534.18, recovered by defendant in error, hereinafter referred to as plaintiff. From the record it appears that defendant was regularly served with process, a declaration was filed, default properly entered, a verdict of the jury was returned finding the defendant guilty and assessing plaintiff's damages at the sum already named, and judgment was thereupon entered on that verdict and assessment of damages.

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upon them and in circumstances in which she was entitled to rely upon them, and that she did rely upon them and was injured thereby. The stock delivered to plaintiff was alleged to be without value, and in this state of the record there is no difficulty in sustaining a judgment based upon a default and an assessment of damages.

It appears, however, that the findings of the jury are in the form of a verdict of guilty and as assessment of damages. In view of the fact that no plea was filed on behalf of defendant, it is clear that there could be no verdict of a jury, but we see no reason why that portion of the verdict which finds the defendant guilty may not be considered surplusage, since the jury included a proper and sufficient assessment of plaintiff's damages.

As the record fails to disclose any reversible error, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

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As the record fails to disclose any reversible error, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

193 - 23159.

208 I.A. 128

WEST SIDE BREWERY COMPANY, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
HANS SORENSEN, Appellant.	)	OF CHICAGO.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks the reversal of a judgment against him which found the right of possession to certain saloon fixtures to be in the appellee. The evidence disclosed that appellee originally owned the saloon fixtures and permitted them to be used by different saloon-keepers from March 1st, 1907, until March 21st, 1910, when the lease of the premises came into possession of one Jasperson, who executed a contract with appellee in which he acknowledged that the fixtures were its property. Afterwards, appellee put in a new icebox, which Jasperson was allowed to use. After Jasperson had been in possession a year and a half, his lease was terminated by the landlord, and one Larsen leased the premises. This was in October, 1911, and in November, 1912, appellee put in two square tables and twelve chairs, and some other fixtures; three and one-half years after that, Larsen sold his lease to appellant; nothing was said in regard to the fixtures, but appellant secured a bill of sale from Jasperson. Jasperson had not been in possession of the fixtures for three and one-half years. There was ample testimony to support the finding of the court that the property was in appellee. Appellant's position is, however, that appellee gave Jasperson the possession of the property and clothed him with the indicia of ownership, and that in consequence, it is estopped to deny

that Jasperson was not the true owner. We think, in answer to this, it is enough to say that Jasperson had not been in possession of the property for three and one-half years, and that during that interval changes were made in, and additions to, it by the appellee, and there was sufficient evidence to justify the court in finding that appellee exercised dominion over it, and did not, in fact, at any time hold out Jasperson as the owner of the property, or act in such a manner as to justify appellant in assuming that it was his. Moreover, Jasperson's evidence would justify the inference that appellant knew that Jasperson had no interest in the property, and that he obtained the bill of sale from Jasperson, for which he paid $1.00, merely for the purpose of clothing himself with some colorable appearance of title, although he knew he was, in reality, obtaining no title at all.

The finding of the court in regard to the title is amply justified by the evidence, and the judgment of the Municipal Court will be affirmed.

AFFIRMED.

that Jacqueson was not the true owner. We think, in answer to this, it is enough to say that Jacqueson had not been in possession of the property for three and one-half years, and that during that interval changes were made in, and additions to, it by the appellee, and there was sufficient evidence to justify the court in finding that appellee exercised dominion over it, and did not, in fact, at any time hold out Jacqueson as the owner of the property, or act in such a manner as to justify appellant in assuming that it was his. Moreover, Jacqueson's evidence would justify the inference that appellant knew that Jacqueson had no interest in the property, and that he obtained the bill of sale from Jacqueson, for which he paid $1.00, merely for the purpose of clothing himself with some colorable appearance of title, although he knew he was, in reality, obtaining no title at all.

The finding of the court in regard to the title is amply justified by the evidence, and the judgment of the municipal court will be affirmed.

AFFIRMED.

197 - 25163.

208 I.A. 129

CITY OF CHICAGO, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
ALEX LANGER, Appellant.	)	OF CHICAGO.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

Appellant was convicted of a violation of Section 1553 of the Municipal Code of Chicago, and a judgment was entered against him assessing a fine of $50.00 and costs; to reverse this judgment, he prosecutes this appeal.

The complaint charged that appellant sold "malt liquors in quantities of one gallon or more at a time without having first obtained a license so to do, at 9034 Commercial avenue, Chicago." The case was heard by the court without a jury, and the court found the defendant guilty of violating the ordinance and assessed the fine already referred to.

The statement of facts recites that the defendant, at 3360 East 91st street, Chicago, Illinois, sold to one Tony Christ one case containing twenty-four bottles of beer which exceeded one gallon in quantity, which was delivered by Langer to Christ at the latter's residence at 3360 East 91st street, Chicago; that appellant was employed by the Old Rose Distilling Company as manager of its store at 9034 Commercial avenue; that there was in effect an ordinance, "being sections 1553 and 1560 of the Revised Municipal Code of Chicago of 1911;" that section 1553 prohibited the sale of any malt liquors in quantities of one gallon or more without obtaining a license so to do for the place of business where the malt liquor is sold, or for the wagons run for the purpose of selling or offering for sale, without any fixed place of

business. Section 1560 provided that any person or corporation who should violate any of the provisions of this article should be fined not less than $25.00 nor more than $100.00, etc. The statement of the case further recited that neither the company nor the defendant had obtained a license for the place of business at 9034 Commercial avenue.

For appellant it is first urged that as he was merely an agent of the Old Rose Distilling Company, he was not liable for its failure to procure a license. It seems a complete answer to this to say that defendant was fined because he sold beer without a license, contrary to the provisions of the statute. It may well be that he would have been protected if his employer had had a license, but it clearly was an offense upon his part to sell beer without obtaining a license himself, where he was acting for a company which had no license.

It is next contended that the complaint did not charge that he did not have a license to sell at 3360 East 91st street, at which place the sale was made, but the statement of the case sets out that that place was the residence of the purchaser. The ordinance required that the seller should have a license for its place of business, and not for the places at which it might sell. Moreover, the ordinance clearly contemplated that dealers should sell malt liquors in quantities in excess of one gallon at places other than their place of business. The facts disclose that defendant, as agent, had a fixed place of business within the meaning of the ordinance; that neither he nor his employer had a license, and in those circumstances, he sold malt liquor in a greater quantity than one gallon. This constituted a violation of the ordinance, without regard

business. Besides this provided such any tension or war-
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to where he may have sold it.

It is next contended that the judgment was for a violation of section 1553, which does not prescribe a penalty. There clearly is no merit in this contention. Defendant was properly found guilty of the offense charged in section 1553. There was no violation of section 1560, for that section provided no rule of conduct, but merely prescribed the penalty. It is also contended that section 1560 provides a penalty for violation of "any of the provisions of this article;" and that it is now shown that the sections were part of the same article. The objection is obviously technical, and is susceptible of an equally technical answer, namely, that the statement of claim recites that these sections 1553 and 1560 constitute "an ordinance" of the City of Chicago; according to the statement of the case the two sections in themselves constituted one complete ordinance, and consequently, the words "any of the provisions of this article," must have referred to section 1553. It must also be remembered that the Municipal Court has the right to, and does, take judicial notice of the ordinances of the City of Chicago, and in support of this judgment we must, therefore, assume that the court, in taking judicial notice of the municipal ordinances, found that the sections in question were, in fact, a part of the same article.

In view of these conclusions, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

by whom he may have until it.

It is most remarkable that the Romans was for a violation of section 1270, which bore not provide a penalty. There clearly is no doubt in this jurisdiction. Jurisdiction was properly found guilty of the offense charged in section 1270. There was no violation of section 1271, the last section provided no rule of conduct, but merely prescribed the penalty. It is also contended that section 1271 provides a penalty for violations of "any of the provisions of this article;" and that it is now urged that the sections were part of the same article. The objection is ingenious, and is susceptible of no equally technical answer. Merely, that the statement of plain meaning that these sections "an ordinance" of the city of Cincinnati according to the ordinance of the same the two sections in therewith constituted one complete ordinance, and correspondingly, the words "any of the provisions of this article," were also authorized by section 1270. It may also be remembered that the municipal court has the right to, and does, take judicial notice of the ordinances of the city of Cincinnati, and in support of this contention we note, therefore, assume that the court, in taking judicial notice of the municipal ordinances, found that the sections in question were, in fact, a part of the same article.

In view of these conclusions, the judgment of the municipal court will be affirmed.

ANTHONY.

60 - 22477

208 I.A. 137

DAISY HANSON HARTS and EDWIN B. HARTS, Administrators of the Estate of Franklin S. Hanson, Deceased,

Defendants in Error,

vs.

CHRISTIAN C. LASMAN, JR.,

Plaintiff in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this writ of error it is sought to reverse a judgment reviving a former judgment.

The record discloses that one Franklin S. Hanson brought suit in the Circuit Court of Cook County against Christian C. Lasman, Sr. and plaintiff in error, Christian C. Lasman, Jr. Service was had upon plaintiff in error but not upon the other defendant. Plaintiff in error was defaulted for want of appearance on September 11, 1897, and judgment entered against him for $580.09. An execution was issued and returned unsatisfied. September 21, 1897, a writ of scire facias was issued and served on Christian C. Lasman, Sr., whereby it was sought to make him a party to the judgment. He filed pleas of the general issue and non-joint liability. The case came on for hearing and on motion of plaintiff the plea of the general issue was stricken from the files over the objection of the defendant and a trial was had on the plea of non-joint

DAIRY BUSINESS BANK and Louis
M. DAVIS, Administrator of
the Estate of Franklin E. Lamson,
Deceased,

Defendants in Error,

vs.

CHRISTIAN C. LAMSON, Jr.,

Plaintiff in Error.

Mr. Justice Dunn delivered the opinion of the court.

By this writ of error it is sought to reverse a judgment reviving a former judgment.

The record discloses that one Franklin E. Lamson brought suit in the Circuit Court of Cook County against Christian C. Lamson, Jr. and plaintiff in error, Christian C. Lamson, Jr. Service was had upon plaintiff in error but not upon the other defendant. Plaintiff in error was defaulted for want of appearance on September 13, 1927, and judgment entered against him for $[illegible].00. An execution was issued and returned unsatisfied. September 21, 1927, a writ of public judicial was issued and served on Christian C. Lamson, Jr., whereby it was sought to make him a party to the judgment. He filed a plea of the joint and non-joint liability. The case came on for hearing and on motion of plaintiff the plea of the general issue was stricken from the files over the objection of the defendant and a trial was had on the plea of non-joint

liability. There was a verdict December 10, 1902, in favor of the plaintiff, and on December 20th, judgment was entered on the verdict. From this judgment Lasman, Sr. prosecuted an appeal to this court, where the judgment was reversed and the cause remanded. Lasman v. Harts, 112 Ill. App. 90. Afterwards the cause was reinstated in the trial court, and on October 26, 1908, on motion of attorneys for the plaintiff an order was entered dismissing the suit without costs. February 24, 1913, plaintiffs in that case (defendants in error) filed a praecipe with the clerk of the Circuit Court asking that a writ of scire facias to revive the judgment of September 11, 1897, be issued, which was accordingly done. The writ was served on plaintiff in error, and on March 19, 1913, he filed his pleas. Afterwards the cause was placed on the short cause calendar, and came on for hearing in the absence of plaintiff in error and his counsel; default was entered against him and the judgment was revived, April 14, 1913. At the next term of court, April 28th, plaintiff in error served notice that he would move the court to set aside the judgment of revival, but the motion was not entered. A similar notice was served on July 18th following, but no motion was entered. On October 13th, a motion in the nature of a writ of error coram nobis to set aside the judgment of revival was entered. This motion was denied, and execution was issued on the judgment January 27, 1914.

It is contended that an assignee of a judgment cannot revive it by scire facias as was done or sought to be done in this case. It appears that after the judg-

liability. There was a verdict December 11, 1912, in favor of the plaintiff, and on December 27th, judgment was entered on the verdict. From this judgment Lawson, Jr. proceeded on appeal to this court, where the judgment was reversed and the cause remanded. Lawson v. Smith, 112 Ill. App. 32. Afterwards the cause was reinstated in the trial court, and on October 26, 1913, on motion of attorneys for the plaintiff an order was entered dismissing the suit without costs. January 24, 1913, plaintiffs in that case (defendants in error) filed a praecipe with the clerk of the Circuit Court asking that a writ of error issue to review the judgment of December 11, 1907, by issued, which was accordingly done. The writ was served on plaintiff in error, and on March 12, 1913, he filed his plea. Afterwards the cause was placed on the short cause calendar, and came on for hearing in the absence of plaintiff in error and his counsel; default was entered against him and the judgment was reviewed, April 14, 1913. At the next term of court, April 28th, plaintiff in error moved vacate that he would move the court to set aside the judgment of reversal, but the motion was not entered. A similar motion was served on July 18th following, but no motion was entered. In October 1913, a motion in the nature of a writ of error coram nobis to set aside the judgment of reversal was entered. This motion was denied, and exception was taken to the judgment January 27, 1914.

It is contended that on evidence of a judgment cannot revive it by entry further on nunc pro tunc order to be done in this case. It appears that after the judg-

ment of 1897, the plaintiff in that case died, and his administrators were substituted. Afterwards the administrators assigned the judgment to Daisy H. Harts, and it is contended that the scire facias proceeding to revive the judgment could not be maintained by her as assignee. If counsel's contention as to the facts be conceded, his conclusion as to the law is incorrect. (Sec. 18, Chap. 110, R. S.). Furthermore, the proceeding to revive was in the name of the administrators and the execution issued thereon was likewise in their name, and not in the name of the assignee. But in no event can plaintiff in error complain. Boone v. Stone, 8 Ill. 537. It is further contended that the writ of scire facias, and other papers are ambiguous, and that it is impossible to ascertain from them who is seeking to have the judgment revived. We agree that the papers are very loosely drawn, but after a careful consideration we think they are sufficient.

It is further urged that the proceeding by writ of scire facias to revive a judgment is not a suit at law, and therefore was not properly placed on the short cause calendar. There is no merit in this point.

It is also urged that the judgment of 1897, "being joint against the two Lasmans, it could not be revived against Lasman, Jr." It is sufficient answer to this contention to say that the judgment of 1897 was against Lasman, Jr. only.

Plaintiff in error further contends that it was reversible error to default him when he had pleas to the merits on file. It has been repeatedly held that it is error to default a defendant who has pleas undisposed of

ment of 1927, the plaintiff in that case died, and his administrators were substituted. Afterwards the administrators assigned the judgment to Daisy H. Burts, and it is contended that the policy holder proceeding to revive the judgment could not be maintained by her as assignee. If counsel's contention as to the facts be conceded, his contention as to the law is incorrect. Code, 1919, Sec. 5. 5. Furthermore, the proceeding to revive was in the name of the administrators and the executions issued thereon was likewise in their name, and not in the name of the assignee. But in no event can plaintiff in error complain. Boone v. Crane, 8 Ill. 547. It is further contended that the suit of Policy Holder, the other parties are employees, and that it is reasonable to ascertain from them who is seeking to have the judgment revived. We agree that the pleadings are very loosely drawn, but after a careful consideration we think they are sufficient.

It is further urged that the proceeding to wit of policy holder to revive a judgment is not a suit at law, and therefore was not properly placed on the short cause calendar. There is no merit in this point.

It is also urged that the judgment of 1927, "being joint against the two lessees, it could not be revived against lessee, Jr." It is sufficient answer to this contention to say that the judgment of 1927 was against lessee, Jr. only.

Plaintiff in error further contends that it was reversible error to submit the case to the jury upon the merits on file. It was held repeatedly here that it is error to deprive a defendant who has been unknowing of

on file. Sammis v. Clark, 17 Ill. 398; Meras, et al v. Adinamis, et al, 195 Ill. App. 92.

Plaintiff in error contends that the judgment of revival was erroneous, for the reason that there was no judgment to revive, as it was reversed by this court in 1906, and for the further reason that after the cause was redocketed it was dismissed by an order entered November 21, 1908. It is obvious that the judgment of this court in the case of Lasman v. Marts, supra, in no way affected the judgment rendered against plaintiff in error in 1897. There was no appeal taken from that judgment at any time, and it is equally obvious that the trial court in entering the order of dismissal in 1908, could not affect the judgment entered in 1897.

We have carefully considered the many other points urged by plaintiff in error, but think none of them sufficient to warrant a reversal of the judgment.

For the error in defaulting plaintiff in error when his pleas were undisposed of, the judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

on file. *Martin V. Black*, 17 Ill. App. 3d; *Lewis, et al. v. Adkinsle, et al.*, 198 Ill. App. 32.

Plaintiff in error contends that the judgment of revival was erroneous, for the reason that there was no judgment to revive, as it was reversed by this court in 1906, and for the further reason that after the cause was redocketed it was dismissed by an order entered November 21, 1908. It is obvious that the judgment of this court in the case of *Lawson V. Martin, supra*, in no way affected the judgment rendered against plaintiff in error in 1897. There was no appeal taken from that judgment at any time, and it is equally obvious that the trial court in entering the order of dismissal in 1908, could not affect the judgment entered in 1897.

We have carefully considered the many other points urged by plaintiff in error, but think none of them sufficient to warrant a reversal of the judgment.

For the error in defaulting plaintiff in error when his pleas were undisposed of, the judgment of the Circuit Court of Cook County is reversed and the cause remanded.

Reversed and remanded.

503 - 22469

CHRISTIAN C. LASMAN,
Appellant,

vs.

DAISY HANSON HARTS, EDWIN B. HARTS and A. A. KUHN,
Appellees.

208 I.A. 139

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal appellant seeks to reverse a decree of the Circuit Court of Cook County, setting aside a sale made by the sheriff of Du Page County of certain real estate, upon condition that appellant pay the purchaser the amount which he had paid for the premises within fifteen days, and that in case appellant failed to make such payment, the bill be dismissed.

The bill in this case was filed to enjoin the enforcement of the judgment upon which the sale was made. Subsequently the property was sold by the sheriff, and afterwards appellant filed a supplemental bill setting up this fact and moved that the sale be set aside. The case was heard before the chancellor and a decree entered setting aside the sale as above stated, for the reason that complainant occupied the premises as a homestead, and the sheriff did not follow the law with reference to setting off the homestead prior to making the sale. The facts of this case are fully set forth in our opinion filed this day in Harts, et al v. Lasman, Gen. No. 22477, and will, therefore, not be repeated here.

SCC - 22410

208 I.A. 139

CHRISTIAN T. LARSEN,
Appellant,

vs.

DAISY FLORENCE BARTS, EDWIN
S. BARTS and L. A. FINN,
Appellees.

MINUTE ORDER,
ALTON TOWN
SCOTT COUNTY.

Mr. JUSTICE O'CONNOR delivered the opinion of the court.

By this second appellant seeks to reverse a decree of the Circuit Court of Scott County, setting aside a sale made by the sheriff of said county of certain real estate, upon conditions that appellant pay the purchaser the amount which he has paid for the premises within fifteen days, and that in case appellant failed to make such payment, the bill be dismissed.

The bill in this case was filed to enjoin the enforcement of the judgment upon which the sale was made. Subsequently the property was sold by the sheriff, and afterwards appellant filed a supplemental bill setting up this fact and moved that the sale be set aside. The case was heard before the chancellor and a decree entered setting aside the sale as above stated, for the reason that complainant occupied the premises as a homestead, and the sheriff did not follow the law with reference to setting off the homestead prior to selling the sale. The facts of this case are fully set forth in our opinion filed this day in Barts, et al v. Larsen, ante, No. 22417, and will, therefore, not be repeated here.

Complaint is made that the chancellor erred in incorporating in the decree findings of fact. It is argued that where a bill is dismissed findings of fact have no proper place in the decree. If we assume that counsel's contention in this regard is correct, it would be of no avail, for the reason that his bill and supplemental bill asked for affirmative relief and the decree awarded him such relief upon payment to the purchaser at the sale the amount paid for the property. There is no merit in the contention.

Appellant contends (1) that the assignee of a judgment cannot revive it by scire facias; (2) that a proceeding to revive a judgment at law by scire facias is not a suit at law, and cannot therefore be placed upon the short cause calendar; (3) that the judgment of 1897 was a joint judgment and could not be revived as to one of the parties; (4) that the judgment revived is erroneous, for the reason that there was no judgment to revive, and that the suit at law in which the judgment was entered was afterwards dismissed. None of these points are well taken, as we have this day held in Harts, et al v. Lasman, supra. Furthermore they could not be urged in this chancery proceeding.

Appellant further contends that when the matter came on for hearing, he was defaulted, although he had pleas on file. No such contention was made before the chancellor. The only point that was there made in this regard was that the defendant was mislead as to when and

Complaint is made that the chancellor erred in incorporating in the decree findings of fact. It is argued that where a bill is dismissed findings of fact have no proper place in the decree. If we assume that counsel's contention in this regard is correct, it would be of no avail, for the reason that his bill and supplemental bill asked for affirmative relief and the decree awarded him such relief upon payment to the purchaser at the sale the amount paid for the property. There is no merit in the contention.

Appellant contends (1) that the sequence of a judgment cannot revive it by entire lapse; (2) that a proceeding to revive a judgment at law by entire lapse is not a suit at law, and cannot therefore be placed upon the short cause calendar; (3) that the judgment of 1897 was a joint judgment and could not be revived as to one of the parties; (4) that the judgment revived is erroneous, for the reason that there was no judgment to revive, and that the suit at law in which the judgment was entered was effectually dismissed. None of these points are well taken, as we have this day held in Davis, et al. v. Lamar, supra. Furthermore they could not be urged in this chancery proceeding.

Appellant further contends that when the matter came on for hearing, he was defaulted, although he had plead to file. No such contention was made before the chancellor. The only point that was there made in this regard was that the defendant was misled as to when and

before what judge that proceeding was to be heard. Counsel in that case testified before the chancellor, and it clearly appears from his testimony that he was notified that the cause would be placed upon the short cause calendar, and that both parties treated the cause as though it were at issue and properly on the short cause calendar. This question seems to be an afterthought and is urged for the first time in this court, which manifestly cannot be done. Moreover, the error, if any, could not be corrected by a court of chancery.

Appellant contends that the decree is erroneous in that no credit was given for $150 which the evidence shows was paid by the executor of Lasman, Sr. in 1892. Whether such credit was given does not appear, and appellant cannot complain, for the reason that he is not required by the decree to pay the amount of the judgment, but only the amount paid at the sale, $550, which is less than the amount of the original judgment and interest, after deducting $150.

We have considered the many other points urged by appellant, but think none of them sufficient to warrant a reversal of the decree.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

before what judge that proceeding was to be heard. Counsel in that case testified before the chancellor, and is clearly aware from his testimony that he was notified that the cause would be taken upon the short cause calendar, and that both parties treated the cause as though it were so issue and properly on the short cause calendar. This question seems to be an afterthought and is urged for the first time in this court, which manifestly cannot be done. Moreover, the error, if any, could not be corrected by a court of chancery.

Appellant contends that the decree is erroneous in that no credit was given for $150 which the evidence shows was paid by the executrix of Isaacson, Sr. in 1922. Whether such credit was given does not appear, and appellant cannot complain, for the reason that he is not required by the decree to pay the amount of the judgment, but only the amount paid at the sale, $750, which is less than the amount of the original judgment and interest, after deducting $150.

We have considered the many other points urged by appellant, but think none of them sufficient to warrant a reversal of the decree.

The decree of the Circuit Court of Cook County is affirmed.

Affirmed.

276 - 22710

208 I.A. 141

DANIEL A. LEVY, JOHN F. TYRRELL
and WILLIAM H. DEVENISH,

Appellees,

vs.

CAROLINE L. D. PAYNE, ET AL.,
Leslie Dudley Carter, Interpleader,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Appellees brought suit in attachment in the Municipal Court of Chicago against Caroline L. D. Payne to recover $6075. Certain parties were served as garnishees. Afterwards appellant, Leslie Dudley Carter, filed a petition of interpleader in that case claiming to be the owner of one-half interest in the photoplay or picture film known as "DuBarry", which had been levied on in the attachment proceedings. The issues raised by the petition of interpleader were tried before the court without a jury, who found in favor of appellees and entered judgment against appellant for costs, to reverse which this appeal is prosecuted.

Appellant first contends that the court committed reversible error in refusing to grant him a change of venue. The record discloses that on July 28, 1915, appellant filed his intervening petition. Subsequently several orders were entered from time to time in the matter and the case was set for hearing January 3, 1916 before Judge Stelk. On December 28, 1915, at three o'clock

276 - 22710

MAXINE A. LEVY, JOHN W. ITTNER
and WILLIAM H. DWYNELSON,

Appellees,

vs.

CARCLINE L. M. PAYNE, ET AL.,
Leslie Dudley Carter, Interpleader,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Appellees brought suit in attachment in the Municipal Court of Chicago against Caroline L. M. Payne to recover $6075. Certain parties were served as garnishees. Afterwards appellant, Leslie Dudley Carter, filed a petition of interpleader in that case claiming to be the owner of one-half interest in the photoplay or picture film known as "DuBarry", which had been levied on in the attachment proceedings. The issues raised by the petition of interpleader were tried before the court without a jury, who found in favor of appellees and entered judgment against appellant for costs, to reverse which this appeal is prosecuted.

Appellant first contends that the court committed reversible error in refusing to grant him a change of venue. The record discloses that on July 22, 1915, appellant filed his intervening petition. Subsequently several orders were entered from time to time in the matter and the case was set for hearing January 3, 1916 before Judge Stein. On December 22, 1915, at three o'clock

P.M., appellant served notice on counsel for appellees that on December 30th at two o'clock P.M. he would appear before Judge Gemmill and present a petition for a change of venue. A copy of the petition for such change of venue was attached to the notice. It set up, inter alia, that Judge Stelk and ten other judges (naming them) were prejudiced against him, and that he feared if the cause were tried before any of the eleven judges he would not receive a fair trial, and that the knowledge of such prejudice first came to him December 27, 1915. The bill of exceptions shows that the cause came on for hearing January 3, 1916, before Judge Stelk. Thereupon counsel for appellant presented his petition for a change of venue, and stated that on the 30th of December he had presented the same petition before Judge Gemmill who was sitting as motion judge; that Judge Gemmill refused to entertain the petition because it grew out of an attachment case, and under the rules of the Municipal Court such matters were properly heard by Judge Stelk; that thereupon he requested Judge Gemmill to transfer the matter forthwith to Judge Stelk; that appellees' counsel then informed the court that Judge Stelk was out of the city and would not return until January 3rd. Judge Stelk then took the matter under advisement and continued the cause, and afterwards denied the petition. In North Chicago St. R. R. Co. v. Leonard, 167 Ill. 618, the court said (619): "Where such a motion is made when the case is called for trial, with the attendant delay and inconvenience in case it is granted, the petitioner should be held to a strict compliance with the statute." And in McClelland v. McClelland, 176 Ill. 83, the court said (93): "It has been uniformly held by this court, that a motion for a change of venue must

F.L., appellant served notice on counsel for appellees that on December 3rd at two o'clock P.M. he would appear before Judge Cassell and present a petition for a change of venue. A copy of the petition for such change of venue was attached to the notice. It set up, inter alia, that Judge Stark was ten other judges (meaning them) were prejudiced against him, and that he feared if the cause were tried before any of the eleven judges he would not receive a fair trial, and that the knowledge of such prejudice first came to him December 27, 1916. The bill of exceptions shows that the cause came on for hearing January 2, 1916, before Judge Stark. The counsel for appellant presented his petition for a change of venue, and stated that on the 30th of December he had presented the same petition before Judge Cassell who was sitting as motion judge; that Judge Cassell refused to entertain the petition because it grew out of an attorney-client case, and under the rules of the municipal court such matters were properly heard by Judge Stark; that therefore he requested Judge Cassell to transfer the matter forthwith to Judge Stark; that appellees' counsel then informed the court that Judge Stark was out of the city and would not return until January 3rd. Judge Stark then took the matter under advisement and continued the cause, and after-wards denied the petition. In Ferris Furnace Co. H. H. Co. v. Kennard, 167 Ill. 618, the court said (623): "Where such a motion is made when the case is called for trial, with the attendant delay and inconvenience in case it is granted, the petitioner should be held to a strict compliance with the statute." And in Wolfsland v. Hollyland, 172 Ill. 83, the court said (88): "It has been uniformly held by this court, that a motion for a change of venue must

be made at the earliest practicable moment, and not put off until just before the cause is to be called for trial." In Glos v. Garrett, 219 Ill. 208, it was contended that the court should have granted the petition there presented for a change of venue. In that case notice was given July 6th that on July 10th exceptions to the master's report would be called for hearing. On Monday July 10th the parties appeared in court and appellant's counsel stated he was then engaged in another case in another court, whereupon he was ruled to file exceptions to the report by Wednesday morning at ten o'clock. He then stated he would probably ask for a change of venue and that the parties had been trying to agree upon another judge to hear the cause, and gave verbal notice to the judge and opposing counsel. Thereupon the judge set aside the order giving him until Wednesday morning to file exceptions and an order was entered allowing him to file them by ten o'clock the next morning. The following morning the exceptions had been filed and solicitor for appellant presented a petition for a change of venue which complied in all respects with the statute, but the judge ruled that the notice given the day before was insufficient, denied the petition and ordered the case to proceed. The Supreme Court in passing on the ruling of the trial court said (213): "The obligation of a judge to allow a change of venue to one who brings himself within the provisions of the statute is imperative and admits of the exercise of no discretion. (Clark v. People, 1 Scam. 117). But the statute requires reasonable notice, and what is reasonable notice in a particular case must be left to the discretion of the judge to whom the application is made, and that discretion will not be interfered with unless abused. (Berry v. Wilkinson, 1 Scam. 164.)

be made at the earliest practicable moment, and not put off until just before the cause is to be called for trial."

In Glen v. Hartzell, 212 Ill. 268, it was contended that the court should have granted the petition there presented for a change of venue. In that case notice was given July 6th that on July 16th exceptions to the master's report would be called for hearing. On Monday July 16th the parties appeared in court and appellant's counsel stated he was then engaged in another case in another court, whereupon he was ruled to file exceptions to the report by Wednesday morning at ten o'clock. He then stated he would probably ask for a change of venue and that the parties had been trying to agree upon another judge to hear the cause, and gave verbal notice to the judge and opposing counsel. Thereupon the judge set aside the order giving him until Wednesday morning to file exceptions and an order was entered allowing him to file them by ten o'clock the next morning. The following morning the exceptions had been filed and solicitor for appellant presented a petition for a change of venue which complied in all respects with the statute, but the judge ruled that the notice given the day before was insufficient, denied the petition and ordered the case to proceed. The supreme court in passing on the ruling of the trial court said [213]: "The obligation of a judge to allow a change of venue to one who brings himself within the provisions of the statute is imperative and admits of the exercise of no discretion. (Park v. People, 1 Scam. 117). But the statute requires reasonable notice, and what is reasonable notice in a particular case must be left to the discretion of the judge to whom the application is made, and that discretion will not be interfered with unless abused. (Kirby v. Hallinger, 1 Scam. 144.)

The cause had not previously been on the calendar of the judge who heard it, but appellants had received notice on July 6 that the exceptions would be called up before him on July 10. We cannot say that it was an abuse of discretion on the part of the court to hold that notice for one day under such circumstances was insufficient." In Hutson v. Wood, 263 Ill. 376, the court said (380): "It is argued that the court erred in denying the complainant's petition for a change of venue on account of the prejudice of the judge. At the September term, 1912, the cause was set for hearing at the November term, on December 10. On December 3 a demurrer to the cross-bill was argued. On December 5 the demurrer was overruled and leave was given to answer the cross-bill, and on December 9 an answer was filed. At 4:20 in the afternoon of that day a notice was delivered to one of the defendants's solicitors that the complainant would on December 10, at eight o'clock A. M., apply for a change of venue on account of the prejudice of the presiding judge, who was the same judge who had heard and overruled the demurrer. The right to a change of venue is absolute where a party brings himself within the provisions of the statute, but the statute requires reasonable notice, and what is reasonable notice is left to the discretion of the judge to whom application is made in the particular case, and this discretion will not be interfered with unless abused. (Glos v. Garrett, 219 Ill. 208). The affidavit of the complainant stated that a knowledge of the judge's prejudice did not come to her until the day the notice was given but did not state the time in the day when she acquired such knowledge. The notice was not served until late in the afternoon and the case was set for hearing the next day. Whether so short a notice was reasonable was a question to

The cause had not previously been on the calendar of the judge who heard it, but appellants had received notice on July 6 that the exceptions would be called up before him on July 10. We cannot say that it was an abuse of discretion on the part of the court to hold that notice for one day under such circumstances was insufficient." In Hutson v. Wood, 263 Ill. 376, the court said (380): "It is argued that the court erred in denying the complainant's petition for a change of venue on account of the prejudice of the judge. At the September term, 1912, the cause was set for hearing at the November term, on December 10. On December 3 a demurrer to the cross-bill was argued. On December 6 the demurrer was overruled and leave was given to answer the cross-bill, and on December 9 an answer was filed. At 4:30 in the afternoon of that day a notice was delivered to one of the defendants's solicitors that the complainant would on December 10, at eight o'clock A. M., apply for a change of venue on account of the prejudice of the presiding judge, who was the same judge who had heard and overruled the demurrer. The right to a change of venue is absolute where a party brings himself within the provisions of the statute, but the statute requires reasonable notice, and what is reasonable notice is left to the discretion of the judge to whom application is made in the particular case, and this discretion will not be interfered with unless abused. (Cice v. Garrett, 219 Ill. 268). The affidavit of the complainant stated that a knowledge of the judge's prejudice did not come to her until the day the notice was given but did not state the time in the day when she acquired such knowledge. The notice was not served until late in the afternoon and the case was set for hearing the next day. Whether so short a notice was reasonable was a question to

be determined by the court in view of all the circumstances, and we cannot say that he abused his discretion in this regard."

In the instant case the trial judge was the same judge who had entered several orders prior to the presentation of the petition for a change of venue. It appears that knowledge of the prejudice of the trial judge and the other ten judges came to the appellant, as he stated in his petition, December 27th; the time of day does not appear. The notice was served on counsel for appellees December 28th at three o'clock P.M. We cannot say under these circumstances that the court abused its discretion in denying the petition for a change of venue.

Appellant further contends that he was entitled to a trial by a jury and argues that by reason of the statute, paragraph 29, chapter 11, R. S., it is mandatory that the issues involved should be tried by a jury, and that paragraph 29 has not been repealed or modified by section 30 of the Municipal Court Act, which provides that unless the plaintiff at the time he commences his suit or the defendant at the time he enters his appearance shall file with the clerk a demand in writing for a jury trial, the issues shall be tried by the court. On July 21, 1915, appellant asked leave to file his intervening petition. The motion was entered and continued to July 28th, and on that date an order was entered giving him leave to file his intervening petition, and it was accordingly filed the same day. Subsequently orders were entered at different times, but no mention was made that appellant desired a jury trial until the case came on for hearing January 3, 1916,

be determined by the court in view of all the circumstances, and we cannot say that he abused his discretion in this regard."

In the instant case the trial judge was the same judge who had entered several orders prior to the presentation of the petition for a change of venue. It appears that knowledge of the prejudice of the trial judge and the other ten judges came to the appellant, as he stated in his petition, December 27th; the time of day does not appear. The motion was served on counsel for appellee December 28th at three o'clock P.M. We cannot say under these circumstances that the court abused its discretion in denying the petition for a change of venue.

Appellant further contends that he was entitled to a trial by a jury and argues that by reason of the statute, paragraph 29, chapter 11, R. S., it is mandatory that the issues involved should be tried by a jury, and that paragraph 29 has not been repealed or modified by section 20 of the municipal Court Act, which provides that unless the plaintiff at the time he commences his suit or the defendant at the time he enters his appearance shall file with the clerk a demand in writing for a jury trial, the issues shall be tried by the court. On July 21, 1919, appellant asked leave to file his intervening petition. The motion was entered and continued to July 28th, and on that date an order was entered giving him leave to file his intervening petition, and it was accordingly filed the same day. Subsequently orders were entered at different times, but no mention was made that appellant desired a jury trial until the case came on for hearing January 5, 1916,

when appellant tendered six dollars to the clerk and then to the judge and demanded in writing a trial by a jury. In the case of Morrison Hotel & Restaurant Co. v. Kirsner, 245 Ill. 431, the Supreme Court held that the provisions of section 30 of the Municipal Court Act, above referred to, are valid. Section 2 of the Municipal Court Act provides that all proceedings for the trial of the right of property where the amount involved is more than $1,000 shall be designated as first class cases, and when the amount is less than $1,000, fourth class cases. Section 30 of the act requiring a demand in writing in case a jury trial is desired applies to these two classes of cases. The provisions of the act therefore expressly cover the proceedings in the instant case, and as appellant did not demand a jury when he filed his intervening petition, the matter was properly tried by the court. Furthermore, the record affirmatively shows that on the trial appellant tendered the six dollars costs provided for in section 56 of the Municipal Court Act, and demanded in writing a jury, as required by section 30 of the act. It is obvious, therefore, that appellant proceeded on the theory that he was not entitled to a jury trial without a demand. He took no such position in the trial court as he has taken in this court, and it is elementary that one cannot shift his position in a court of review.

Appellant further contends that the evidence does not show that the defendant in the attachment suit was indebted to appellees. The evidence clearly shows that appellees had rendered services and advanced certain moneys for the defendant. The evidence as towhether appellees agreed to render the services and advance the moneys to

whom appellant tendered six dollars to the clerk and then to the judge and demanded in writing a trial by a jury. In the case of Jordison Hotel & Restaurant Co. v. Kirmser, 248 Ill. 431, the Supreme Court held that the provisions of section 30 of the municipal Court Act, above referred to, are valid. Section 2 of the municipal Court Act provides that all proceedings for the trial of the right of property where the amount involved is more than $1,000 shall be designated as first class cases, and where the amount is less than $1,000, fourth class cases. Section 30 of the act requiring a demand in writing in case a jury trial is a right applies to these two classes of cases. The provisions of the act therefore expressly cover the proceedings in the instant case, and as appellant did not demand a jury when he filed his intervening petition, the matter was properly tried by the court. Furthermore, the record affirmatively shows that on the trial appellant tendered the six dollars costs provided for in section 56 of the Municipal Court Act, and demanded in writing a jury, as required by section 30 of the act. It is obvious, therefore, that appellant proceeded on the theory that he was not entitled to a jury trial without a demand. He took no such position in the trial court as he has taken in this court, and it is elementary that one cannot suit his position in a court of review.

Appellant further contends that the evidence does not show that the defendant in the attachment suit was indebted to appellees. The evidence clearly shows that appellees had rendered services and advanced certain moneys for the defendant. The evidence as to whether appellees agreed to render the services and advance the moneys to

appellant upon a contingent basis, or whether the defendant there agreed to pay appellees for such services and disbursements, was conflicting. The court saw and heard the witnesses on the stand, and after a careful consideration we are unable to say that his finding that there was evidence of some indebtedness of the defendant in the attachment suit to appellees, is against the manifest weight of the evidence.

Appellant further contends that the court should have found that he was the bona fide owner of the one-half interest in the photoplay or picture film under an assignment from his mother, the defendant in the attachment suit. The court found that the assignment to appellant by his mother was fraudulent, collusive and invalid as against the claim of appellees. It would serve no useful purpose to analyze the evidence in this regard. Suffice it to say that we have carefully considered it and are clearly of the opinion that the court's finding was fully justified.

It is further argued that the judgment is erroneous in that the record discloses that appellees prior to the trial had assigned all of their interest to one King, which assignment was filed of record and introduced in evidence, and therefore appellees had no claim against the defendant in the attachment suit. It is immaterial to the defendant in the attachment suit whether such assignment had been made. She should be compelled topay the money only once. The filing of the assignment was only for the purpose of protecting the equitable interest of the assignee. Defendant cannot take advantage of it. Boone v. Stone, 8 Ill. 537. It therefore follows that appellant cannot successfully urge this point.

appellant upon a contingent basis, or whether the defendant there agreed to pay appellees for such services and disbursements, was conflicting. The court saw and heard the witnesses on the stand, and after a careful consideration we are unable to say that his finding that there was evidence of some indebtedness of the defendant in the attachment suit to appellees, is against the manifest weight of the evidence.

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It is further argued that the judgment is erroneous in that the record discloses that appellees prior to the trial had assigned all of their interest to one Kirk, until assignment was filed of record and introduced in evidence, and therefore appellees had no claim against the defendant in the attachment suit. It is immaterial to the defendant in the attachment suit whether such assignment had been made, and could be complained today the money only case. The filing of the assignment was only for the purpose of protecting the equitable interest of the assignee. Defendant cannot take advantage of it. Boone v. Stone, 8 Ill. 327. It therefore follows that appellant cannot successfully urge this point.

Appellant further argues that the evidence shows that the defendant in the attachment suit was not indebted to appellees, for the further reason that it appears that appellees' claim against the defendant was for legal services rendered in a chancery proceeding in which the defendant in the attahhment suit was complainant, and in that proceeding appellees also represented a receiver appointed by the court. There is no merit in this contention, as the evidence tends to show that no charge was made by the appellees for the services rendered the receiver, and, moreover, it does not appear that the interests of complainant and the receiver were adverse.

Appellant further contends that the evidence shows that the defendant in attachment was not insolvent at the time of the assignment from her to appellant of the property involved, and therefore the conveyance was not fraudulent as to appellees. The defendant in the attachment suit introduced evidence tending to show that she had property in New York and Ohio more than sufficient to pay any claim that appellees had against her. The court, however, found from the evidence, and we think his finding was justified, that the assignment was merely colorable, and that no assignment was in fact made.

Complaint is made of other errors of the trial court, but after a careful consideration, we are of the opinion that none of them constitute reversible error.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Appellant further argues that the evidence shows that the defendant in the attachment suit was not indebted to appellees, for the further reason that it appears that appellees' claim against the defendant was for legal services rendered in a chancery proceeding in which the defendant in the attachment suit was complainant, and in that proceeding appellees also represented a receiver appointed by the court. There is no merit in this contention, as the evidence tends to show that no charge was made by the appellees for the services rendered the receiver, and, moreover, it does not appear that the interests of complainant and the receiver were adverse.

Appellant further contends that the evidence shows that the defendant in attachment was not insolvent at the time of the assignment from her to appellant of the property involved, and therefore the conveyance was not fraudulent as to appellees. The defendant in the attachment suit introduced evidence tending to show that she had property in New York and Ohio more than sufficient to pay any claim that appellees had against her. The court, however, found from the evidence, and we think his finding was justified, that the assignment was merely colorable, and that no assignment was in fact made.

Complaint is made of other errors of the trial court, but after a careful examination, we are of the opinion that none of them constitute reversible error.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

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208 I.A. 153

LOUIS H. MAHNKE, Jr., Administrator of the Estate of Louis H. Mahnke, Deceased,

Appellee,

vs.

P. J. HARMON,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This appeal is prosecuted to reverse an order of the Municipal Court of Chicago denying appellant's motion to vacate a judgment of $1,556.83, entered by confession. In support of the motion to vacate appellant submitted one affidavit, and the only question for our consideration is whether such afidavit set up a prima facie defense. State Bank of Clinton v. Parkhurst, 155 Ill. App. 101; Blue v. Keenan, 130 Ill. App. 312; Dionne v. Matzenbaugh, 49 Ill. App. 527; Mastin v. Richardson, 134 Ill. App. 252.

The affidavit was made by one Denis L. Harmon, who avers that he has been for eleven years last past the discount teller in the Stockmen's Trust & Savings Bank; that appellant has a valid defense, in that the note in suit was without consideration and that it was executed and delivered under the following circumstances: Appellant, P. J. Harmon, was president of the Stockmen's Trust & Savings Bank, and procured the bank to loan to appellee's

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208 I.A. 153

LOUIS K. MAMMEN, Jr., administrator
of the estate of Louis K. Mammen,
Deceased,

Appellee,

vs.

P. J. MAMMEN,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This appeal is prosecuted to reverse an order of the Municipal Court of Chicago denying appellant's motion to vacate a judgment of $1,286.83, entered by confession. In support of the motion to vacate appellant submitted one affidavit, and the only question for our consideration is whether such affidavit set up a prima facie defense. State Bank of Clinton v. Parkhurst, 185 Ill. App. 161; Blue v. Herman, 130 Ill. App. 312; Dionne v. Bateschmidt, 49 Ill. App. 527; Martin v. Atkinson, 124 Ill. App. 528.

The affidavit was made by one Louis J. Herman, who avers that he has been for eleven years last past the discount teller in the Stockmen's Trust & Savings Bank; that appellant has a valid defense, in that the note in suit was without consideration and that it was executed and delivered under the following circumstances: Appellant, P. J. Harmon, was president of the Stockmen's Trust & Savings Bank, and procured the bank to loan to appellee's

intestate, Louis H. Mahnke, during the years 1908 and 1909, $11,000; that said sum became due and owing from Louis H. Mahnke to the bank about March 2, 1909; that Mahnke was then unable to pay the indebtedness, but shortly thereafter he was to receive from a railroad company a sum of money more than sufficient to cover his indebtedness to the bank; that the bank insisted that appellant procure Mahnke to pay his indebtedness to it; that appellant informed Mahnke of the bank's demand, and thereupon Mahnke agreed to pay the bank out of the money he was to receive from the railroad company, and in consideration of Mahnke's paying his indebtedness, he demanded $1,000 from appellant; that pursuant to said demand, and in order to secure the payment of Mahnke's indebtedness to the bank, appellant executed and delivered the note in suit; that Mahnke never paid his indebtedness to the bank, and that the consideration for which the note was given entirely failed; that said Mahnke during his life time never requested payment of the note.

We have carefully considered the several contentions made by appellee as to the insufficiency of the affidavit, and while it may be that the facts set up are not averred with the certainty required in formal pleadings, yet we think it was sufficient in substance to establish a prima facie defense to the note, and that the court should have granted appellant's motion to vacate the judgment and give him leave to defend.

The order of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

intestate, Louis H. Mahnke, during the years 1908 and 1909, $11,000; that said sum became due and owing from Louis H. Mahnke to the bank about March 8, 1909; that Mahnke was then unable to pay the indebtedness, but shortly thereafter he was to receive from a railroad company a sum of money more than sufficient to cover his indebtedness to the bank; that the bank insisted that appellant procure Mahnke to pay his indebtedness to it; that appellant informed Mahnke of the bank's demand, and thereupon Mahnke agreed to pay the bank out of the money he was to receive from the railroad company, and in consideration of Mahnke's paying his indebtedness, he demanded $1,000 from appellant; that pursuant to said demand, and in order to secure the payment of Mahnke's indebtedness to the bank, appellant executed and delivered the note in suit; that Mahnke never paid his indebtedness to the bank, and that the consideration for which the note was given entirely failed; that said Mahnke during his life time never requested payment of the note.

We have carefully considered the several contentions made by appellee as to the insufficiency of the affidavit, and while it may be that the facts set up are not averred with the certainty required in formal pleadings, yet we think it was sufficient in substance to establish a prima facie defense to the note, and that the court should have granted appellant's motion to vacate the judgment and give him leave to defend.

The order of the municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

392 - 22347

R. J. KITTREDGE,

Plaintiff in Error,

vs.

UNION LIFE INSURANCE CO.,

Defendant in Error.

208 I.A. 160

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff (plaintiff in error) having brought suit in the Municipal Court against the defendant (defendant in error) for the sum of $250.00, for money paid to the defendant, contends here that the trial judge erred in rendering judgment for the defendant.

Plaintiff in his amended statement of claim sets forth, among other things, that his claim is for the recovery of the sum of $250.00, paid by check dated September 18, 1911, to the defendant corporation; that said money was received by and used by the defendant corporation for its benefit; that he, plaintiff, received no consideration for the said sum of money; that there was no express agreement between the plaintiff and the defendant corporation with reference to the return of the said sum of money; that under the law there is an implied agreement for the return of the said money to the plaintiff; that the defendant although often requested has failed and neglected to return to plaintiff the said sum of money. The defendant in its affidavit of merits, denies the debt as set forth in plaintiff's statement of claim,

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2. J. KITTREDGE.

Plaintiff in error.

vs.

UNION LIFE INSURANCE CO.,

Defendant in error.

MEMORANDUM DECISION OF COURT.

MR. JUSTICE TAFT delivered the opinion of the court.

The plaintiff (plaintiff in error) having brought suit in the municipal court against the defendant (defendant in error) for the sum of $300.00, for money paid to the defendant, contends that the trial judge erred in rendering judgment for the defendant.

Plaintiff in his amended statement of claim sets forth, among other things, that his claim is for the recovery of the sum of $300.00, paid by check dated September 12, 1921, to the defendant corporation; that said money was received by and used by the defendant corporation for its benefit; that he, plaintiff, received no consideration for the said sum of money; that there was no express agreement between the plaintiff and the defendant corporation with reference to the return of the said sum of money; that under the law there is an implied agreement for the return of the said money to the plaintiff; that the defendant although often requested had failed and neglected to return to plaintiff the said sum of money. The defendant in its affidavit of merits, denies the last as set forth in plaintiff's statement of claim,

and states affirmatively that the plaintiff did pay to one C. G. Lumley the sum of $250, pursuant to a certain agreement evidenced by a receipt.

The plaintiff, a stockholder of the defendant corporation, on September 18, 1911, attended a meeting of its stockholders, at which there were present a number of the stockholders, directors and officers of the defendant corporation. At that meeting the subject of the impairment of the capital stock of the defendant company was discussed, as the Insurance Department of the State of Illinois had demanded that a certain amount of money must be deposited with the state or the company would have to cease its insurance business. At that meeting, also, a certain amount of money was advanced or agreed to be advanced, and the plaintiff gave his check for $250 and received therefor a receipt as follows:

"Chicago, Sept. 18th, 1911.

Received of R. J. Kittredge Two Hundred Fifty and no/100 Dollars in full payment for 12½ shares of Union Life Ins. Stock same to be issued in case impairment is removed, otherwise money to be returned to him.

(Signed) C. G. Lumley, Trustee."

Altogether, at that meeting, $19,520 was advanced or agreed to be advanced. The evidence shows that on October 6, 1911, a check for $19,520.38, the amount obtained as the result of the meeting on September 18, 1911, was given by E. P. Strandberg Co. and subsequently turned over and paid to the defendant, Union Life Insurance Co., and that the $250 paid by the plaintiff, for which he received the Lumley receipt, was part of that payment. On September 20, 1913, the plaintiff wrote to the defendant company

and states affirmatively that the plaintiff did pay to one G. G. Lemley the sum of $150, pursuant to a certain agreement evidenced by a receipt.

The plaintiff, a stockholder of the defendant corporation, on September 12, 1911, attended a meeting of its stockholders, at which there were present a number of the stockholders, directors and officers of the defendant corporation. At that meeting the subject of the investment of the capital stock of the defendant company was discussed, as the Insurance Department of the State of Illinois had demanded that a certain amount of money must be deposited with the state or the company would have to cease its insurance business. At that meeting, also, a certain amount of money was advanced or agreed to be advanced, and the plaintiff gave his check for $150 and received therefor a receipt as follows:

"Chicago, Sept. 12th, 1911.

Received of A. J. Kittredge the enclosed fifty and no/100 Dollars in full payment for his share of Union Life Ins. Stock same to be issued in case Legislature is passed, otherwise money to be returned to him.

(Signed) G. G. Lemley, Trustee."

Altogether, at that meeting, $19,500 was advanced or agreed to be advanced. The evidence shows that on October 6, 1911, a check for $19,500.00, the amount obtained as the result of the meeting on September 12, 1911, was given by E. F. Blanchard to, and actually turned over and paid to the defendant, Union Life Insurance Co., and that the $150 paid by the plaintiff, for which he received the Lemley receipt, was part of that payment. In September 20, 1911, the plaintiff wrote to the defendant company

stating that "as the stock has never been issued to me; would request that you kindly return the money thereon," and on September 23, 1913, the defendant answered plaintiff's letter of the 20th, in part as follows: "Relative to the $250 you subscribed in September, 1911, beg to state that this money cannot be returned to you. If you will send us your check for $250 we will then issue you 25 shares of stock." The evidence further shows that the impairment to the stock of the defendant company was removed. At the close of the evidence the court sustained a motion of the defendant corporation to dismiss the case on the ground that the plaintiff had failed to make out a case against the defendant corporation and entered judgment for the defendant.

The question arises whether the plaintiff sufficiently proved the cause of action set forth in his statement of claim. The defendant claims that there is no competent evidence in the record showing any payment by the plaintiff to the defendant of the $250, or any other sum; that the transaction described in the plaintiff's evidence is but a personal transaction between the plaintiff and one C. G. Lumley, who is not shown to be an agent of the defendant, and that there is a variance between the statement of claim and the proof.

Obviously the evidence sufficiently demonstrates that the $250 which the plaintiff on September 18, 1911, paid at a meeting of stockholders and officers of the defendant company, to "C. G. Lumley, Trustee," was paid over through E. P. Strandberg Co. on October 6, 1911, to the defendant corporation. Then the receipt of September 18,

stating that "as the stock has never been issued to me; would request that you kindly return the money thereon," and on September 23, 1913, the defendant answered plaintiff's letter of the 20th, in part as follows: "Relative to the $250 you subscribed in September, 1911, beg to state that this money cannot be returned to you. If you will send us your check for $250 we will then issue you 25 shares of stock." The evidence further shows that the indorsement to the stock of the defendant company was removed. At the close of the evidence the court sustained a motion of the defendant corporation to dismiss the case on the ground that the plaintiff had failed to make out a case against the defendant corporation and entered judgment for the defendant.

The question arises whether the plaintiff sufficiently proved the cause of action set forth in his statement of claim. The defendant claims that there is no competent evidence in the record showing any payment by the plaintiff to the defendant of the $250, or any other sum; that the transaction described in the plaintiff's evidence is but a personal transaction between the plaintiff and one C. G. Landy, who is not shown to be an agent of the defendant, and that there is a variance between the statement of claim and the proof.

Obviously the evidence sufficiently demonstrates that the $250 which the plaintiff on September 12, 1911, paid at a meeting of stockholders and officers of the defendant company, to "C. G. Landy, Trustee," was paid over through C. F. Stroughton, on October 6, 1911, to the defendant corporation. Then the credit of September 11,

1911, is to the effect that the $250 was in full payment for 12½ shares of stock in the defendant corporation, which stock was to be issued subsequently to the plaintiff (in case the impairment was removed) "otherwise it was to be returned to him." And, further, the impairment was removed and the plaintiff thereupon was entitled to 12½ shares of the defendant company's stock or a return of his money. Over two years elapsed in which he did not receive either the 12½ shares of stock or the $250. The plaintiff might have sued for specific performance and undertaken to obtain the 12½ shares of stock to which he was entitled, but, as the defendant saw fit to refuse to give him the stock or his money back, we see no reason why the plaintiff was not entitled to sue as he did, at law, for the $250 wrongfully retained by the defendant company.

The plaintiff in his statement of claim sets forth quite exactly what the nature of his demand is, and that we conceive is sufficient. Also, that statement is entirely consistent with the evidence. The evidence as to the meeting of the stockholders and officers of the defendant, as to the receipt signed by Lumley, Trustee, together with the testimony of Strandberg that the $250 of the plaintiff was included in the check for $19,520.38, which was paid over to the defendant corporation, all taken together, certainly make our a <u>prima facie</u> case, consistent with the plaintiff's statement of claim and in support of it, against the defendant corporation. The plaintiff's statement of claim recites that the defendant received the plaintiff's money without consideration; that, therefore, there is implied a promise to pay it back.

1911, is to the effect that the $250 was in full payment for 124 shares of stock in the defendant corporation, which stock was to be issued subsequently to the plaintiff (in case the impediment was removed) "otherwise it was to be returned to him." And, further, the impediment was removed and the plaintiff thereupon was entitled to 124 shares of the defendant company's stock or a return of his money. Over two years elapsed in which he did not receive either the 124 shares of stock or the $250. The plaintiff might have sued for specific performance and undertaken to obtain the 124 shares of stock to which he was entitled, but, as the defendant was fit to refuse to give him the stock or his money back, we see no reason why the plaintiff was not entitled to sue as he did, at law, for the $250 wrongfully retained by the defendant company.

The plaintiff in his statement of claim sets forth quite exactly what the nature of his demand is, and that we consider is sufficient. Also, that statement is entirely consistent with the evidence. The evidence as to the meeting of the stockholders and efforts of the defendant, as to the receipt signed by Insley, Trustee, together with the testimony of Townsberg that the $250 of the plaintiff was included in the sum for $13,320.59, which was paid over to the defendant corporation, all taken together, certainly make out a prima facie case. Consistent with the plaintiff's statement of claim and in support of it, against the defendant corporation. The plaintiff's statement of claim states that the defendant received the plaintiff's money without consideration; that, therefore, there is implied a promise to pay it back.

The court in First National Bank v. Gatton, 172 Ill. 625, uses and sanctions the following language:

> "It is the well recognized doctrine that the action for money had and received may be maintained whenever the defendant has obtained money of the plaintiff which, in equity and conscience, he has no right to retain. * * * When money has been thus received, the law implies a promise to pay, notwithstanding there was no privity between the parties."

For the reasons herein set forth the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

The court in *First National Bank v. Gaines*, 192 Ill. 638, uses and emphasizes the following language:

> "It is the well recognized doctrine that the action for money lent, received and on settlement wherever the defendant has obtained money of the plaintiff which, in equity and conscience, he has no right to retain. In a case where money has been thus received, the law implies a promise to pay, notwithstanding there can be privity between the parties."

For the reasons stated set forth the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

412 - 22367

MARGARET WELCH,

Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY,

Appellee.

208 I.A. 161

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal in a personal injury case from a judgment upon a directed verdict in favor of the defendant. The plaintiff (appellant) Margaret Welch, a laundress, forty-seven years of age, on the evening of October 3, 1911, a few minutes before ten o'clock, in order to take an east-bound car on Sixty-third street, at the southeast corner of Sixty-third and Aberdeen streets, walked south on the east side of Aberdeen street to Sixty-third street and then undertook to cross over Sixty-third street in a south-easterly direction, when she was struck by an east-bound car and severely injured.

At the close of the plaintiff's evidence the trial judge, upon motion of the defendant, directed the jury to find for the defendant and judgment for the defendant was accordingly entered thereon.

It is the claim of the plaintiff that there was sufficient evidence tending to prove the plaintiff's case, to justify its submission to the jury. On the other hand, it is the contention of the defendant that the evidence

HARGRAVE WILSON,

Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY,

Appellee.

Appeal from
Superior Court,
Cook County.

MR. JUSTICE FARLOW delivered the opinion of the court.

This is an appeal in a personal injury case from a judgment upon a directed verdict in favor of the defendant. The plaintiff (appellant) Hargrave Wilson, a laundryman, forty-seven years of age, on the evening of October 2, 1911, a few minutes before ten o'clock, in order to take an eastbound car on Sixty-third street, at the southwest corner of Sixty-third and Aberdeen streets, walked south on the east side of Aberdeen street to Sixty-third street and then undertook to cross over Sixty-third street in a westerly direction, when he was struck by an east-bound car and severely injured.

At the close of the plaintiff's evidence the trial judge, upon motion of the defendant, directed the jury to find for the defendant and judgment for the defendant was accordingly entered thereon.

It is the claim of the plaintiff that there was sufficient evidence tending to prove the plaintiff's case, to justify its submission to the jury. On the other hand, it is the contention of the defendant that the evidence

shows that the plaintiff was not exercising ordinary care for her own safety and was guilty of negligence which proximately contributed to her injury.

On Sixty-third street there were two tracks, one on the north side of the street for west-bound cars and one on the south side for east-bound cars. The plaintiff walked south on the east side of Aberdeen street, to the northeast corner of Sixty-third and Aberdeen streets, then left the curb and went east and south. As she started diagonally to cross Sixty-third street, going southeasterly, she looked and saw a car to the west on Aberdeen street, about a block away, at May street. The latter being a short block west of Aberdeen street. That was the car that she expected to take to go east. She saw two colored women at the southeast corner of Sixty-third and Aberdeen streets, who were standing on the street, off the sidewalk, apparently waiting to take an east-bound car. They were some short distanceseast of the east line of Aberdeen street. She looked again, while walking across Sixty-third street, and saw the car to be about in the middle of the block, that is, about halfway between May and Aberdeen streets. At that time she was on the north rail of the west-bound track in Sixty-third street. She saw that the car was coming very fast. She looked and saw the car a third time and then "it was across the street". At that time she was about halfway between the west-bound tracks. She went on, walking fast all the time, and going far enough east so as to be beyond the car when it stopped, as she expected, at the southeast corner of Sixty-third and Aberdeen streets. After getting more than a car's length east of the east

shows that the plaintiff was not exercising ordinary care for her own safety and was guilty of negligence which proximately contributed to her injury.

On Sixty-third street there were two tracks, one on the north side of the street for west-bound cars and one on the south side for east-bound cars. The plaintiff walked south on the east side of Aberdeen street, to the northeast corner of Sixty-third and Aberdeen streets, then left the curb and went east and south. As she started diagonally to cross Sixty-third street, going southeasterly, she looked and saw a car to the west on Aberdeen street, about a block away, on the street. The latter being a short block west of Aberdeen street. That was the car that she expected to take to go east. She saw two elderly women at the northeast corner of Sixty-third and Aberdeen streets, who were standing on the street, all the although apparently waiting to take an east-bound car. They were some short distancewest of the east line of Aberdeen street. She looked again, while walking across Sixty-third street, and saw the car to be about in the middle of the block, that is, about halfway between May and Aberdeen streets. At that time she was on the north rail of the west-bound track in Sixty-third street. She saw that the car was coming very fast. She looked and saw the car a third time and then "it was across the street". At that time she was about halfway between the west-bound tracks. She went on, walking fast all the time, and going far enough east so as to be beyond the car when it stopped, as she expected, at the southeast corner of Sixty-third and Aberdeen streets. After getting more than a car's length east of the east

line north and south of Aberdeen street and being farther south then the south rail of the west-bound tracks on Sixty-third street, and being near the north rail of the east-bound track, she was struck by the east-bound car. It had been raining and, at the time of the accident, it was misting. Evidently she expected the east-bound car to stop at the southeast corner of Aberdeen and Sixty-third streets to take on the two women who stood there in the street at that corner. As a result of the injury her right femur was broken, causing the right leg thereafter to be about one and a half inches shorter than the left. A number of witnesses to the accident were called by the plaintiff and all their testimony is practically consistent with that of the plaintiff herself. The testimony tends to prove that the car was, at the time, traveling fast and that no bell was sounded or signal given at or near the crossing.

The plaintiff suffered a serious injury evidently through taking a dangerous chance. The trial judge, being of the opinion that the evidence showed that the plaintiff was not in the exercise of ordinary care for her own safety and, therefore, was guilty of negligence which contributed to her injury, directed a verdict for the defendant. Having in mind the law as it exists in this state and applying its principles to the evidence adduced, we are unable to conclude that the court erred in directing a verdict. The evidence tends to show that the proximate cause of her injury was not the negligence of the defendant but rather that of herself. From her testimony it appears that she knew, at least in a fairly definite way, all the time, from the moment she saw the street car at May street, just about where the car was from time to time and at what speed it

line north and south of Atkinson street has being further south than the south rail of the west-bound tracks on Eighth street, and being near the north rail of the east-bound track, she was struck by the east-bound car. It had been raining and, at the time of the accident, it was raining. Evidently she injured the west-bound car is also at the southeast corner of Atkinson and Eighth-Eighth street is also on the two women who stood there in the street at that moment. As a result of the injury her right femur was broken, causing the right leg thereafter to be shorter one and a half inches shorter than the left. A number of witnesses to the accident were called by the plaintiff and all their testimony is practically consistent with that of the plaintiff herself. The testimony tends to prove that the car was, at the time, travelling fast and that no bell was sounded or signal given at or near the crossing.

The plaintiff suffered a serious injury evidently through being a negligent chance. The trial judge, being of the opinion that the evidence showed that the plaintiff was not in the exercise of ordinary care for her own safety and, therefore, was guilty of negligence which contributed to her injury, directed a verdict for the defendant. Having in mind the law as it exists in this state and applying its principles to the evidence adduced, we are unable to conclude that the court erred in directing a verdict. The evidence tends to show that the proximate cause of her injury was not the negligence of the defendant but rather that of herself. From her testimony it appears that she knew, at least in a fairly detailed way, all this time, from the moment she saw the street car at her street, just about where the car was from time to time and at what speed it

was coming and, therefore, the danger she was in as she walked across the street in the direction she took. She may have expected the defendant to stop the car at the corner, but there is no rule of law which requires a street railway company to stop its cars at all points upon a signal to take on passengers; and it follows that the failure to stop for prospective passengers who may be standing at the street corner, does not of itself prove actionable negligence. Westerman v. U. Rys. Co. of Baltimore, 96 Atl. 355. Winchell v. St. P. St. Ry. Co., 90 N. W. 1050. The fact that the evidence tended to show that no bell was rung or warning given, does not seem to be of any especial importance, inasmuch as the plaintiff admits that there was nothing to obstruct her view of the approaching car and that she saw it from time to time as it traveled from May street on. Dahms v. Sempsell, 178 Ill. App. 644. Sackarnd v. C. Rys. Co. 185 Ill. App. 457. Roberts Admr. v. C. Ry. Co., 262 Ill. 288. E. A. & S. Track Co. v. Brown, 129 Ill. App. 62.

The evidence as to the speed of the car is somewhat vague, though, considering the distance from May street to the place in the street where she was struck and the distance the plaintiff traveled walking from the time she first saw the car, it is impossible to say that the car was going at an abnormal rate of speed.

Considering all the evidence seems to prove, however, we are compelled to reach the same conclusion as the trial judge, that the evidence does not sufficiently tend to prove ordinary care on the part of the plaintiff.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

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The evidence as to the speed of the car is somewhat vague, though, considering the distance from her street to the place in the street where she was struck and the distance the plaintiff traveled walking from the time she first saw the car, it is impossible to say that the car was going at an unusual rate of speed.

Considering all the evidence seems to prove, moreover, we are compelled to reach the same conclusion as the trial judge, that the evidence does not sufficiently tend to prove ordinary care on the part of the plaintiff.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

133 - 22556

W. R. VALENTINE HAUSER and BENJAMIN NEUMAN, by FREDERICK R. HAUSER, their next friend,

Defendants in Error,

vs.

MARMON CHICAGO COMPANY, a corporation,

Plaintiff in Error.

208 I.A. 171

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The defendants in error, W. R. Valentine Hauser and Benjamin Neuman, minors (hereinafter for convenience called plaintiffs) bought a second-hand automobile from the plaintiff in error, hereinafter called the defendant, for $600, of which purchase price they paid $450, and then, after using the automobile from the middle of June until October 5, 1915, returned it to the defendant and, on the ground that they, the plaintiffs, were under the age of twenty-one years at the time of the purchase, sued the defendant for $450, the amount of the purchase price which they had paid. The defendant contends (1) that, at the time of the purchase of the automobile by the plaintiffs, they represented themselves to the defendant as over twenty-one years of age; (2) that, although the plaintiffs did return the automobile, they are not entitled to rescind the contract. The cause was tried without a jury and judgment entered against the defendant in the sum of $450. Some question was raised in the course of the trial as to whether or not the plaintiffs, when purchasing the automobile, had represented themselves

F. R. VALENTINE BUSSER and BENJAMIN NEWMAN, by FRIEDLICH R. MAURER, their next friend, Defendants in Error,	
vs.	MEMOR TO MUNICIPAL COURT OF CHICAGO.
MARCUS CHICAGO CORPORATION, a corporation, Plaintiff in Error.	

MR. JUSTICE TAYLOR delivered the opinion of the court.

The defendants in error, F. R. Valentine Busser and Benjamin Newman, minors (hereinafter for convenience called plaintiffs) bought a second-hand automobile from the plaintiff in error, hereinafter called the defendant, for $600, of which purchase price they paid $450, and then, after using the automobile from the middle of June until October 8, 1919, returned it to the defendant and, on the ground that they, the plaintiffs, were under the age of twenty-one years at the time of the purchase, sued the defendant for $450, the amount of the purchase price which they had paid. The defendant contends (1) that, at the time of the purchase of the automobile by the plaintiffs, they represented themselves to the defendant as over twenty-one years of age; (2) that, although the plaintiffs did return the automobile, they are not entitled to rescind the contract. The cause was tried without a jury and judgment entered against the defendant in the sum of $450. Good question was raised in the course of the trial as to whether or not the plaintiffs, when purchasing the automobile, had represented themselves

to be of age. On that subject evidence was offered, some of which was conflicting, but, on the whole, we are of the opinion that the trial judge was justified in concluding that, as to their age, there was no fraud or deceit practiced by the plaintiffs.

The substantial question in the case is whether the plaintiffs were entitled, upon returning the automobile, although it had been used and had deteriorated in value, to rescind the contract of sale and recover back that part of the purchase price which had already been paid. On this subject there seems to be some conflict in the law as it exists in different jurisdictions. In this state, however, the law seems to be that the minor, upon a restoration of that part of the consideration which he has, may rescind the contract. In other words, it is not necessary for him, as a prerequisite to rescission, to give back the equivalent of that which he received. In Wuller v. Chuse Grocery Company, 241 Ill. 398, Mr. Justice Dunn used the following language: "The consideration, or such part of it as remains in the possession of the minor, must be returned, but if he has lost or expended it so that he cannot restore it, he is not obliged to make restitution." In the course of that decision the court took special pains to repudiate the opposite doctrine as expressed in 1 Parson's on Contracts, 332. In Coe v. Moon, 260 Ill. 76, Mr. Justice Carter said: "To give effect to an infant's disaffirmance of his contract it is not necessary that the other party be placed in statu quo, for if the law in every case required restitution of the consideration as a condition precedent to the disaffirmance of a contract, it would often result in

to be of age. On that subject evidence was offered, none of which was conflicting, but, in the end, we are of the opinion that the trial judge was justified in concluding that, as to their age, there was no fraud or deceit practiced by the plaintiffs.

The substantial question in the case is whether the plaintiffs were entitled, upon returning the automobile, although it had been used one and depreciated in value, to rescind the contract of sale and recover back that part of the purchase price which had already been paid. In this subject there seems to be some conflict in the law as it exists in different jurisdictions. In this state, however, the law seems to be that the seller, upon a restoration of that part of the consideration which he has, may rescind the contract. In other words, it is not necessary for him, as a prerequisite to rescission, to give back the equivalent of that which he received. In Miller v. Chase Grocery Company, 241 Ill. 395, Mr. Justice Dunn used the following language: "The consideration, or such part of it as remains in the possession of the minor, must be returned, but if he has lost or expended it so that he cannot restore it, he is not obliged to make restitution." In the course of that decision the court took special pains to repudiate the opposite doctrine as expressed in Kauffman v. Grasmuck, 154 Ill. 79 in Dee v. Kerr, 228 Ill. 74, Mr. Justice Carter said: "The law relent to an infant's disaffirmance of his contract it is not necessary that the other party be placed in status quo, for if the law in every case required restitution of the consideration as a condition precedent to the disaffirmance of a contract, it would often result in

accomplishing indirectly what it expressly says shall not be done directly, and the purpose of permitting infants to avoid their contracts might often be thus defeated." From the foregoing it follows, therefore, that even though the automobile may have been worth less when it was returned than when it was purchased, the plaintiffs were legally entitled to disaffirm their contract and recover back the money which they had paid.

Finding no errors in the record the judgment is affirmed.

AFFIRMED.

accomplishing indirectly what it apparently may not do directly, and the purpose of permitting rebates to avoid their contracts might often be thus defeated.' From the foregoing it follows, therefore, that even though the automobile may have been worth less when it was returned than when it was purchased, the plaintiffs were equally entitled to disaffirm their contract and recover back the money which they had paid.

Finding no error in the record the judgment is affirmed.

Affirmed.

181 - 23147

CONTINENTAL AND COMMERCIAL NATIONAL BANK OF CHICAGO,
Appellee,

vs.

WOND & PARKER TRADING CO. et al.,
Appellants.

208 I.A. 180

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for $1058.17 in the Circuit Court against the defendants by confession entered upon a note for $1,000, with warrant of attorney to confess judgment.

The judgment was entered on December 12, 1916, and on January 6, 1917, the defendants' motion to vacate the judgment was denied and this appeal prayed and perfected to this court from that order. On May 25th this court, on motion of defendants, struck the bill of exceptions from the record and reserved the motion to affirm to the hearing. Plaintiff on June 4, 1917, moved to vacate or modify the order of May 25th and to affirm the judgment in advance of the hearing, which, on June 8, 1917, this court denied.

The bill of exceptions not being before us, our determination of this appeal rests upon any error which may appear in the common law record; finding none, the judgment of the Circuit Court is affirmed.

AFFIRMED.

375 - 23549.

208 I.A. 186

EDWARD MARKS,
Appellee,

vs.

AMERICAN FURNITURE NOVELTY COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $976.71 on a trial before the court. The claim was for merchandise sold and delivered by plaintiff's assignors to defendant. The amount of this claim is not in serious dispute. The controversy arises on the cross claim of defendant for an alleged breach of a contract which defendant claims to have made with plaintiff's assignors for certain merchandise in the claim of set-off set out. Defendant claimed loss of profits in the sum of $824.67 on the contention that the goodswere specialties and that they were to be made to order and could not be bought in the open market. Such profits consisted in the difference between the prices at which the goods were bought and those at which defendant sold them for delivery for the Christmas trade. The recovery was for goods actually delivered to defendant at the contract price.

We think the trial judge might reasonably find from the evidence that the transactions set up in plaintiff's statement of claim and defendant's claim of set-off were separate and constituted not one but two transactions; that defendant failed to sustain by proof its claim of set-off;

that it also failed to prove that it had performed the material conditions of its contract; and, further, that it had in material financial matters breached the contract and also that plaintiff's assignors by reason of such breach were justified in abrogating the contract in the manner they did.

We are further of the opinion as matter of law that defendant's claim, which we hold is for unliquidated damages, is not proper to be set off in this action, as it in no way grows out of or is connected with the cause of action set out in plaintiff's statement of claim. Turnbull Joice Lumber Co. v. Chicago Lumber & Coal Co., 152 Ill. App. 347.

Damages which, as in this case, are arrived at by computing the difference between the contract price and the price at which the goods were claimed to have been resold, are unliquidated, Higbie v. Rust, 211 Ill. 333; Horn v. Noble, 95 Ill. App. 99; Smith v. Billings, 62 ibid 77; American Laundry Machinery Co. v. Barr, 176 ibid 519. Unliquidated damages are such as are unascertained, as those arising out of a breach of a contract where the amount of damages has not been determined by agreement.

There is no reversible error in this record, and the judgment of the Municipal Court is affirmed.

AFFIRMED.

that it also failed to prove that it had complied the material conditions of the contract; and, further, that it had in material fundamental respects breached the contract and also that plaintiff's assignors by reason of such breach were justified in abandoning the contract in the manner they did.

In the further of the opinion on motion of the defendant's claim, which we will in the anticipatory manner, is not proper to be set off in this action, as it is no more nor of or is connected with the cause of action set out in plaintiff's statement of claim. Insofar below Ltd. v. Hudson Lumber & Land Co., 5th Ill. App. 547.

Under which, as in this case, are matters as by adopting the alternative method the contract price and the price of which the parties were claimed to have been paid, are multiplied. Jackson v. Bell, 111 Ill. 340; Lane v. Tuttle, 94 Ill. App. 61; Jackson v. Hickman, 88 Ill. App. 47; Lumber Company Dodgeman Co. v. Bier, 174 Ill. App. Multiplied damages are such as are consequential, as flows arising out of a breach of a contract where the damage damage has not been contemplated by agreement.

There is no controlling error in this record, and the judgment of the municipal court is affirmed.

Affirmed.

415 - 22370

JULIA A. GORDON, Executrix of the Last Will and Testament of Margaretta Krohn, deceased,
Appellee,

vs.

GERTRUDE BRUCKER, Executrix of the Last Will and Testament of Michael Brucker, deceased,
Appellant.

208 I.A. 188

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The original bill of complaint was filed March 30, 1892, by Margaretta Krohn, a stockholder in the W. C. Metzner Stove Repair Company, against Michael Brucker, James L. Morris, William C. Metzner, Julia A. Metzner and W. C. Metzner Stove Repair Company, a corporation.

On April 20, 1892, Julia A. Metzner, a daughter of the original complainant, filed an answer which admitted the facts set forth in the bill, and on the same day she also filed a cross-bill against all of the other defendants named in the original bill, in which she prayed for substantially the same relief as prayed for in the original bill.

It was alleged in the original bill that the complainant, Margaretta Krohn, was the owner of 60 shares of stock in the W. C. Metzner Stove Repair Company (hereinafter to be called "the Company"); that on March 3, 1890, the company gave a bill of sale to defendant, Michael Brucker, of all its assets, in consideration of his promise to pay all the indebtedness of the company; that while the bill of sale was absolute on its face, it was in fact a mortgage given to secure Brucker for whatever money he might advance to pay off the indebtedness of the company, and also for whatever was due Brucker at the time the bill of sale was executed; that after

[illegible]

[illegible]

[illegible]

the execution of the bill of sale Brucker had carried on the business formerly conducted by the company; that he had made great profits therefrom and that he refuses to account therefor to the company; that it was understood by the parties at the time the bill of sale was executed that Brucker was to hold the property of the company in trust; and that it was agreed that after he had paid the liabilities of the company, as stated, he was to account for any balance in his possession to the company and its stockholders. The bill prayed for the appointment of a receiver and that Brucker be required to account and pay over to the receiver any balance found to be due the company and its stockholders, and that the business of the company be wound up and settled and its assets distributed among its stockholders.

~~The cross-bill of Julia A. Metzner alleged substantially the same facts and it prayed for substantially the same relief as that of the original bill.~~

The defendant, Brucker, filed answers in which he stated that the bill of sale referred to in the bill and cross-bill was not a mortgage; that it was not given to him conditionally; that it was an absolute transfer to him of all the property and assets of the company in consideration of his agreement to pay all of its indebtedness; and that he had not entered into any agreement under which the bill of sale was to be regarded as a mortgage.

The cause was referred to a master in chancery, who in his report recommended the appointment of a receiver and also that Gertrude Brucker, as the executrix of the last will and testament of Michael Brucker, be ordered to render an accounting. From the evidence taken by

[illegible]

[illegible]

[illegible]

the master it appears that the company was organized in 1885 to carry on a stove repair business; that W. C. Metzner, defendant, was the principal stockholder therein, and that he became its president and general manager; that the company had dealt with the defendant, Brucker, and in the year 1885, being indebted to him and other creditors, it executed a bill of sale to him of all of its assets, and in return therefor he, Brucker, delivered to the company a declaration of trust, in which it appeared that Brucker had received the bill of sale as security for money to be advanced by him to pay the then indebtedness of the company. The parties having complied with this agreement and understanding, Brucker reconveyed the property to the company by a bill of sale.

The evidence heard also shows that in 1890 the treasurer of the company, without authority of the company, negotiated certain notes of the company and appropriated to his own use the proceeds thereof. At this time the company was otherwise heavily indebted, and on March 3, 1890, the stockholders and board of directors of the company passed a resolution which authorized the execution of a bill of sale to Brucker in consideration of his agreement to pay all the debts and liabilities of the company. A bill of sale was thereupon executed and was duly acknowledged before a Justice of the Peace and recorded. Brucker immediately thereafter took possession of all of the assets of the company. He later sold the retail business, formerly conducted by the company, to James L. Morris, defendant, for $7,000.00.

A short time after the execution of the bill of sale W. C. Metzner was elected president, Morris, defendant, was made vice-president, Brucker, defendant, was

the modern it appears that the religious was expressing in fact no entity on a more simple behaviour; that it, or rather, definitely, was the physiological stimulation concerned, and that he became its prophet and general manager; that the sympathy that dwelt with the definition, Dreamer, and in the great life, being impelled to him and other revelators, it assumed a will of evil to him of all of its powers, and in reform itself or, Dreamer, interested in the congress a delicate sign of trust, in which it appeared that Jesuits had received the gift of this as capability for money to be advanced by him to pay the their indebtedness of the congress. The parties having complied with this agreement and administration, Dreamer transferred the property to the company by a bill of sale.

The witness heard this above that in some the treasurer of the company, client activity of the company, negotiated certain of the company not participated in his own the personal Dreamer. At time the congress was education industry initial, and on June 2, 1890, the secretaries and vector of directors of the congress passed a resolution which authorized the execution of a bill of sale to transfer in consideration of the agreement to pay all the debts the indebtedness of the company. A bill of sale was therefore executed and the duly authorized failure a payment of the issue and receipt. Dreamer successfully instituted such transaction of all of the worth of the company. He then sell the total inventory, interest conducted by the company, to James S. Morris, Delaghdri, for $9,000.00.

I shall then state the execution of the bill of sale v. U. between the plaintiff Dreamer, Defendant, Morris, and wife-petitioner, Dreamer, defendant, was made

made treasurer, and Julia A. Metzner, cross-complainant, was made secretary of the company, and a resolution was adopted approving the execution of the bill of sale in question to Brucker. The bill of sale was, in form, an absolute conveyance of the company's assets; and, so far as the evidence shows, nothing appears to have been said at the stockholders' or directors' meetings and nothing appears in the resolution referred to which discloses that the bill of sale was in fact intended to be a chattel mortgage.

The objections which were filed to the master's report were, on motion, allowed to stand as exceptions. The exceptions were overruled and a decree was entered in the cause in favor of the complainant and cross-complainant, and the executrix of the estate of Brucker, deceased, brings the case here, by appeal, for review.

H. D. Pauls and B. W. Viers accepted service of summons as attorneys for the corporation, and on April 20, 1892, they entered its appearance as a defendant in the cause. It is urged that in that these attorneys also represented the cross-complainant and that Mr. Paul had withdrawn his appearance as solicitor for the corporation, it was not properly in court as a party defendant. This question does not seem to have been raised on the trial. It cannot be raised here for the first time. It does not appear that Mr. Viers had at any time withdrawn either his appearance or the appearance of the corporation, and, so far as the record shows, it was represented by counsel i n the proceedings had in the Circuit court.

It is also urged on behalf of the defendants that the record of the meeting of the stockholders and of

made treasurer, and John S. Cabaniss, vice-chairman were made secretary of the company, and a resolution was adopted approving the resolution of the bill of sale in question if thought, the bill of sale was, in fact, an illegal conveyance of the company's assets; and, as no evidence been, nothing appears to have been said at the shareholders' or directors' meetings and nothing appears in the resolution referred to which indicates that the bill of sale was in fact intended to be a mortgage.

The objections which were filed to the auditor's report were, on motion, allowed to stand as exceptions. The exceptions were overruled and a decree was entered in the case in favor of the complainant and cross-complainant, and the receivership of the estate of Thatcher, Deceased, taken till case hereof, by Sheet, the review.

T. J. Davis and E. V. Stone described circumstances of accounts as evidence for the corporation, but in fact do, just, that notwithstanding its existence as a corporation in the owner. It is urged that in that these statements were presented the cross-complainant was that by, that had withdrawn his appearance as solicitor for the corporation. It was but properly in small as a right determent. This contention does not seem to have been raised on the trial. It cannot be raised here for the first time. In fact the appear that by, Davis and at any time withdrew either his appearance or the appearance of the corporation. And, as far as the record shows, it was determined by counsel a the proceedings not in the Circuit Court.

It is also urged on behalf of the defendants that the record of the meeting of the stockholders and of

the Board of directors and the recitals of the bill of sale could not be varied or altered by parol evidence. The resolution which was passed at the stockholders' meeting does recite that the bill of sale to be executed was to be unconditional. The resolution of the board of directors which authorized the execution of the bill of sale is silent as to whether the sale was to be conditional. Merritt v. Terrence, 102 N. W. 154, is a case similar in its main particulars to the instant case, and the point was there made that parol evidence was not admissible to contradict the terms of written instruments. In deciding the case the court said:

> "The evidence is such as to show that defendant took the entire property as security for the indebtedness owing him and not absolutely, and that the transaction was, in effect, a mortgage. Evidence to establish such a relation is competent, and the implied agreement growing out of such a situation is not different from the express one upon which plaintiff relies."

Other authorities cited by counsel for complainant sustain their contention that parol evidence was admissible to show the true nature of the transaction, as a result of which the defendant, Brucker, gained possession of all of the company's assets. Counsel for defendant in their brief say:

> "We ask, in all sincerity, what declaration or writing could have been made by Brucker of the company which would have excluded the possibility of the introduction of verbal testimony to vary or contradict it?"

Parol evidence is always admissible for the purpose of showing the true consideration which enters into the making of a written contract. This is an exception to the general rule that parol evidence is not admissible for the purpose of contradicting or varying the terms of a written agreement, and the books are replete with cases where the exception to the rule has been applied for the purpose of

the board of directors and the inability of the bill of sale could not be varied or altered by parol evidence. The proposition which was passed at the stockholders' meeting does imply that the bill of sale to be executed was to be unconditional. The resolution of the board of directors which authorized the execution of the bill of sale to stipulate as to whether the sale was to be unconditional. Smith v. Tuscarora, 124 N. Y. 241, is a case similar to the case presently to the instant case, and the point was there made that parol evidence was not admissible to contradict the terms of written instruments. In deciding the case the court said:

> "The evidence in such as to show that the defendant had the entire property as security for the indebtedness owing him and not absolutely, and that the transaction was, in effect, a mortgage. Evidence to establish such a fact is competent, and the implied agreement arising out of such a situation is not different from the express one upon which identity rests."

Later authorities cited by counsel for appellants are equally hostile contradiction and parol evidence admissible to show the true nature of the transaction, as a transfer of which the defendant, Smith, gained possession of all of the company's assets. Counsel for defendant in their brief say:

> "To sum, in all economy, such conditions as arising which have been made a transfer of the company which would have avoided the possibility of the injurious action of creditor. Evidence to show or substantiate all

Parol evidence is clearly admissible for the purpose of showing the true transaction which makes this the making of a valid contract. This is no contradiction the general rule that parol evidence is not admissible for the purpose of substituting or varying the terms of a written instrument, and the terms are varied with means the conditions to the sale has been adjusted for the purpose of

showing that a written instrument, purporting upon its face to be a bill of sale, or a deed of land, was in fact, by the understanding of the parties thereto, a mortgage.

It is urged in this court, and apparently for the first time, that the court erred in admitting evidence which tended to contradict the resolutions referred to and the recitals of the bill of sale. No objection seems to have been made on the hearing to the admissibility of this evidence, but even though such objection had been made, it is apparent that the evidence was admissible. That the contemporaneous oral agreements by the parties were admissible for the purpose of showing the true nature of the transaction in question and to prevent the perpetration of a fraud upon the complainant is, we think, without much doubt.

In Moore v. Foster, 97 Ill. App. 233, the court said:

> "No matter what form of words were used in the bill of sale and in the transfer of the notes and accounts, such an arrangement was a mortgage and nothing else. Jones on Chattel Mortgages, Sec. 1; 3 Pomeroy Eq. Jur., secs. 1192 to 1196. It was competent, notwithstanding the terms of the bill of sale, to show by parol what the actual transaction was. National Insurance Co. v. Webster, 83 Ill. 470."

It is insisted that the company was a necessary party complainant and that the complainant before bringing her bill should have appealed to the company to appear as complainant in the cause. Sufficient evidence was heard by the master to support his conclusion that the officers and most of the stockholders of the company had entered into an agreement, which, in fraud of the rights of the complainant, had for its purpose the wiping out of all of the corporation's assets. All of the directors of the corporation were present at the directors' meeting where the resolutions were adopted, and are charged in the bill of complaint with being parties to

showing that a written instrument, purporting upon its face to be a bill of sale, or a bond of land, was in fact, by the understanding of the parties thereto, a mortgage.

It is urged in this court, and apparently for the first time, that the court erred in admitting evidence going to establish the transaction referred to and the execution of the bill of sale. Its objection seems to have been made on the trial in the admissibility of this evidence, but even though such objection had been made, it is apparent that the evidence was admissible. That the contemporaneous oral agreements of the parties were admissible for the purpose of showing the true nature of the transaction in question and to prevent the perpetration of a fraud upon the mortgagorhas been, of late, often stated.

In Scott v. Jones, 37 Ill. App. 112, the court said:

> "The matter most less of terms into need in the bill of sale and in the instrument of the notes and mortgage, such as attachment and a mortgage and notes. Same be treated transaction, and. Is a tenant in. ..., same, like to line. It was mortgage, existing the time terms of the bill of sale, to same be part that the other transaction was. Internal Improvement Co. v. Wheeler, 60 Ill. 477."

It is insisted that the company was a necessary party complainant and that its complainant before trial the bill would have appeared as the company to appear as complainant in the case. Authorities cited were made by the master to support his conclusion that the affiant and most of the stockholders of the company had entered into an agreement, which, in fact, is fraud of the rights of the mortgagee, and for its purpose the assent was of all of the corporation's assets. All of the directors of the corporation were present at the corporate meeting where the resolutions were adopted, and are shown in the bill of complaint with being parties to

the transaction which the master found was essentially fraudulent. The bill charged that the company neglected and refused to call Brucker to account for the value of the assets which he had received. The company, in fact, defaulted in that it failed to file any answer to the bill of complaint. The defendant Brucker did not raise this point in the trial court by demurrer, plea or answer to the bill. He filed an answer to the bill in which he took issue upon the charge that the bill of sale in question was intended to be in fact a mortgage.

Ordinarily, where a corporation's right or interest is sought to be enforced by proceedings in a court of equity, the proceedings should be begun in the name of the corporation. It is usually, in such cases, a necessary party-complainant. This rule is not, however, applicable to a case where, as stated in the case of Bruschke v. North Chicago Schuentzen Verein, 145 Ill. 433, "equity permits a stockholder, either individually or on behalf of himself * * * to maintain a suit in such cases against the wrong doing directors or officers, where it appears and it is averred that the corporation itself * * * refuses to begin the suit * * * or where there is disclosed by the plaintiff's pleading a state of things which renders it reasonably certain that a suit by the corporation would be impossible and a demand unavailing."

We think it fairly evident on the evidence heard that a demand by the complainant or the corporation to bring this suit would be unavailing, but however this may be, the defendant is not in a position to insist upon this failure as a ground for a reversal of the decree. He failed to raise the question in the trial court by plea, demurrer, or otherwise, and it is now too late to urge it in this court.

We do not think there is merit in the contention that the complainant, Julia A. Gordon, does not come

into court with clean hands and that she is therefore entitled to no relief in equity. Julia A. Corden appears in the case as a cross-complainant and again as executrix of the last will and testament of Margaretta Krohn, deceased, the original complainant. There is no evidence which tends to show that the original complainant, Margaretta Krohn, participated in the actions and conduct which she complained of in her bill, and whatever may be said as to the part taken by the cross-complainant in the transaction referred to, it cannot be held that her knowledge of wrong doing, if any, may in law be imputed to the complainant.

It is true, as asserted, that the original complainant's interest in the corporation was small, it being but 60 shares of stock out of a total capital stock of 6,000 shares. This interest, though small, is still subject to the protection of a court of equity, and there can be little doubt that she has equitable cause to complain of the conduct of the defendant Brucker.

It is argued that on the whole evidence the decree should have been in favor of the defendant. The transcript of the evidence here is very long and it would be impossible, within reasonable limits, to indicate its general purport. We are of the opinion that the evidence supports the conclusions of fact reached by the master, and, on the whole record, we are not enabled to say that these conclusions were so erroneous as to warrant a reversal of the decree. There is some evidence in the record which would sustain a finding that the company did transact business for some months after the delivery of the bill of sale in question to Brucker. The bill of sale was acknowledged before a Justice of the Peace, even though, as it is contended, there were notaries public

been years with it was touch and that was in therefore un-
willed to be jailed in equity. Julia A. Lerman argues in
the case as a stereotypicalness and again an economic or his
lack will and harmonic of interpretive frame. However, the
political complicated. There is no evidence which leads to
show that the original complainant, Jacqueline Lerman, con-
tributed in the notions and amount which was constituted of
in her gift, and moreover how is well as in the past issue
or the average relationship in the transaction relative to. It
remains be with that her knowledge of every taken, if any, may
be lay be injected to the complainant.

It is true, as mentioned, that the original com-
plainant's interest in the orientation was small. It being
but an income of alone and a valid original claim of
a[illegible] mother. This interest, though small, is still more
than to the protection of a court of equity. The issue was
be little enough that the equitable maxim is complain of
the conduct of the defendant therein.

It is argued that on the basis evidence the
defense should have been in favor of the defendant. The
transaction of her relative gift is very long and it would be
impossible, since presumably lapse, to indicate the
general property. In one of the opinion that the relative
supports the conditions of that transfer by the master, and,
on the basis result, on his act decided to my that time con-
clusion have to determine do to instead a interest of the de-
cree. There is some evidence in the record which would warrant
a finding that the original the transfer relative in some lapse
also the history of the gift of this is sufficient to trigger.
The suit of this was substantially active a jurisdiction of the trans.
even though, as it is mentioned, there was sufficient judge

present when it was executed. We think this is some support for the argument that the parties intended that this bill of sale, absolute upon its face, was to operate as a chattel mortgage, as, under the statutes of this state, the acknowledgment by a justice of the peace would not be necessary to give validity to the instrument as a bill of sale.

The company was reorganized after the bill of sale was executed, with W. C. Metzner as president and Brucker as treasurer. Metzner received a salary of $25.00 per week, while Brucker drew $15.00, out of the proceeds of the business conducted by Brucker and formerly owned and operated by the company. No reason has been shown why the existence of the company should be maintained or its reorganization perfected, as stated, if the contentions of counsel for the defendant be true that Brucker had purchased all of its assets and had agreed to pay all its liabilities.

The witnesses for the plaintiff directly contradict each other as to what was said at certain conferences with reference to the consideration for the execution of the bill of sale. The master had an opportunity to hear and see these witnesses and to judge of the credibility of each. We are unable, therefore, to say that the conclusions reached by him on the issues were erroneous.

We think that, under the circumstances of the case, the court did not err in appointing a receiver for the company; on the accounting ordered by the court the company may be entitled to receive, for the benefit of the stockholders, a considerable sum of money from the estate of the deceased defendant, Brucker. There does not seem, at this late date, so far as we are able to determine from the record, to be any person or persons authorized to receive property for the company, and under such circumstances the

[illegible] when it was enacted. He later said he was against it for the argument that the parties intended that this bill of sale, execute upon its face, was to operate as a conveyance, or, under the circumstances of this case, the admission adopted by a jurisdiction of the power would not be necessary to give validity to the instrument as a bill of sale.

The company was reorganized after the bill of sale was executed, with C. C. Calhoun as president and Andrew M Stevenson. Between December a policy of insurance, while Insurance dated 1913, and of the property of the Company conducted by Stevenson and Carnegie owned and operated by the company. In January the same month was the existence of the company should be maintained as the transportation business. He stated, if the negotiations of company for the purchase he also that Carnegie and Stevenson all of the people that appeared to you well the [illegible].

The witnesses for the plaintiff directly contradicted what Mr. Carnegie or Mr. Stevenson said or another conversation with reference to the consideration for the execution of the bill of sale. The matter had no opportunity to hear and see these witnesses and to judge of the credibility of them. The are unable, therefore, to say that the conclusions reached by him on his finding were erroneous.

We think then, upon the circumstances of the case, the court did not err in rendering a judgment for the company; the mere contention entered by the court the same that is entitled to receive, for the benefit of the stockholders, a consideration of under from the bills of the assumed indebtedness. Therefore. Have done not wrong, in this case. Or for to be sure to determine from the record. So is not proper to consider collateral to matters material for the company, the [illegible] stockholders

court did not err in appointing a receiver.

The decree of the Circuit Court must be affirmed.

AFFIRMED.

83 - 23037

208 I.A. 198

PAULINE WITKOWSKY,
Plaintiff in Error,

vs.

CHARLES E. AFFELD et al.,
Defendants in Error.

ERROR TO
CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE DENEN DELIVERED THE OPINION OF THE COURT.

Pauline Witkowsky, widow of Conrad Witkowsky, and sole beneficiary under his will, filed her bill of complaint in which Charles E. Affeld, Albert Tonk, Charles E. Affeld, Jr., and James Witkowsky were made party defendants. It is alleged in the bill, inter alia, that the three first named defendants wrongfully kept possession and control of certain insurance records; that they, in violation of the provisions of an express contract between the parties and of a fiduciary relationship which existed between them, have excluded the complainant from certain rights and privileges in the use of such records. The bill prayed for the appointment of a receiver and for an injunction to restrain the wrongful use of the records in question. At the time the bill was filed the complainant and James Witkowsky, her son, a defendant, were partners in an insurance business. In an answer filed by James Witkowsky, he admitted that the complainant was entitled to the relief prayed for in her bill.

The three other defendants were, at the time the bill was filed, also engaged as partners in an insurance business. A demurrer to the amended and supplemental bill was sustained and the bill was dismissed for want of equity.

Andrew Mitchell,
Plaintiff in error,

vs.

Charles W. Atkins et al.,
Defendants in error.

Error to Jackson Circuit Court.

Mr. Justice Grant delivered the opinion of the court.

Justice Kleinhans, sitting in Circuit Chancery, and with hearing waived by the bill, filed her bill of complaint in which Charles W. Atkins, Grant Trat, Charles H. Atkins, Jr., and Jesse Kleinhans were made party defendants. It is alleged in the bill, inter alia, that the three first named defendants wrongfully kept possession and control of certain business property. That then, in violation of the provisions of an express contract between the parties and of a fiduciary relationship which existed between them, have received the complainant from certain rights and privileges in the use of joint property. The bill prays for the appointment of a receiver and for an injunction to restrain the wrongful use of the property in question. At the time the bill was filed the complainant and James Kleinhans, her son, a minor, were partners in an business business. In an answer filed by Jesse Kleinhans, he admitted that the complainant was entitled to the relief prayed for in her bill.

The three other defendants have, at the time the bill was filed, been engaged as partners in an business business. A demurrer to the general and equitable bill was overruled and the bill was dismissed for want of equity.

The facts as gathered from the pleadings are substantially as follows:

In 1873 Conrad Witkowsky and Charles E. Affeld formed a partnership to conduct an insurance agency in Chicago under the firm name of Witkowsky & Affeld. Conrad Witkowsky died in 1914. ~~From 1873 until 1912 the partners were equal in interests in the business of the firm.~~ Shortly after Witkowsky died a controversy arose between complainant and Affeld, the surviving partner, in reference to certain underwriting records, the property of the prior existing partnership. These records consisted of certain files, books and maps, which, it is alleged, contained a history of all insurance policies issued through the partnership with complete lists of customers' names, addresses and dates of expiring policies; and, it ~~is~~ was alleged that the records in question were indispensable data of an insurance office and were required in the work of soliciting a renewal of the expiring policies. After the death of Witkowsky, his widow, the complainant, and her son, organized the firm of Witkowsky & Company, and, ~~as stated,~~ the other defendants organized the firm of Affeld, Tonk & Company. Charles E. Affeld, the surviving partner, turned over all of the records, books, papers etc., of the former partnership to the firm of Affeld, Tonk & Company, which firm used the books and records as their private property and excluded the complainant from any use of or access thereto. A controversy having arisen between the complainant and the surviving partner concerning their reciprocal rights to the use and possession of these records, a bill was filed by the complainant in which she sought to enjoin him from using the records in his private business unless he should grant to complainant an equal opportunity to use them. On May 20th

The facts as gathered from the pleadings are substantially as follows:

In 1873 James Hickman and Charles A. Lloyd formed a partnership to conduct an insurance agency in Chicago under the firm name of Hickman & Lloyd. James Hickman died in 1914. From 1873 until 1911 the partners were equal in interests in the business at the time. Shortly after Hickman died a controversy arose between surviving and affiant, the surviving partner, in relation to certain unadvertising records, the property of the firm existing partnership. These records consisted of certain files, books and maps, which is in dispute, containing a history of all insurance policies issued through the partnership with complete lists of customers' names, addresses and dates of expiring policies; and, it is alleged that the records in question were indispensable aids of an insurance office and were required in the work of soliciting a renewal of the expiring policies. After the death of Hickman, his widow, the complainant, had her son, appointed the firm of Hickman & Company, and, subsequent, the other defendants organized the firm of Lloyd, Lack & Company. Charles A. Lloyd, the surviving partner, burned over all of the records, books, papers etc., of the former partnership in the fall of 1913, took a receipt, which the said the order and records as their private property and endorsed the complainant from any use of or access thereto. A controversy having arisen between the complainant and the surviving partner concerning their respective rights in the use and possession of these records, a bill was filed by the complainant in which she sought to enjoin the from using the records in his private business unless he should grant to complainant an equal opportunity to use them. In her bill

1914, the parties entered into a written contract and the suit was dismissed by agreement.

The contract ~~in question~~ expressly provided that the parties to it intended by the agreement to adjust all controversies between them concerning the rights and obligation arising out of the dissolution of the firm of Witkowsky & Affeld, except as provided by section 8 of the contract, and to define the interests of the respective parties in the assets and records of the dissolved partnership. ~~Within the limits permitted it will be impossible to set out all of the provisions of this contract. It is sufficient to say that it is clearly evident that the rights of the parties in and to the use of inspection of the records in question must be determined by a construction of this contract.~~

It ~~is~~ was alleged that after the contract had been in force for fifteen months, and without any justification, Affeld, Tonk & Company changed their policy and took the position that the complainant was entitled only to such information as the records contained on April 2, 1914; that Affeld Tonk & Company had exclusive rights to information subsequently acquired relating to changes in policies, which had been issued through the former partnership, and ~~in substance~~ it ~~is~~ was insisted that this after-acquired information was used for the sole benefit of Affeld, Tonk & Company, and that the complainant was excluded from any use thereof; that it would

lain, the parties entered into a written contract
and the fair was finalized by agreement.

The contract in question expressly
provided that the property is to remained in the
exclusive to object all controversies between
them concerning the terms and fulfillment with-
ing out of the circumstances of the time of filing of
a action, namely as provided by section 2 of the
contract, and to define the jurisdiction of the ex-
clusive position in the courts and towns of the
financial particulars. Since the trial court
acted in spite of jurisdiction in no-one all of the
particular actions matters. It is also clear so
that that it is clearly evident that the property of
the action is not of the nature of immovable of the
property is problematic to determined it's
existence of this contract.

It is alleged that after the contract had
been in force for fifteen months, and without any fault
fraudulent, affiliated a company changed their office
and took the position that the complainant was entitled
only to such information as the records contained on
April 6, fifteen years ago a company had concerns
claims to determine commercially negotiated building in
changes in policies, which had been issued through the
former partnership, and in consequence it is in interest that
the after-delivered definition was done for the full
benefit of affiliated. Then a company, and that the
complainant was entitled if so only was concerned, that is which

not be possible for her and her partner to successfully conduct an insurance business if she were denied the use and possession of this data; and that the defendant's conduct constituted a breach of not only the contract in question, but also of an implied contract arising out of a fiduciary and confidential relationship between the parties.

It was provided in the contract that certain insurance policies expiration notices should be kept in the same form as theretofore used by Witkowsky & Affeld; that the defendant had for fifteen months complied with this provision, but that thereafter they had refused to perform the requirements of this covenant.

Two principal questions are presented to us for decision: the first is, did such fiduciary relation exist between the parties as would entitle the complainant to the relief she prayed; and, second; are the rights of the parties as expressed in the contract of such character that a court of equity will, on a construction of the contract, compel the defendants to comply with its terms and provisions?

It is urged by complainant that the defendants were under a fiduciary obligation aside from the requirements of the contract to permit the complainant free access to and use of the underwriting records. This argument is based upon the fact that complainant's deceased husband and Charles E. Affeld for many years had been partners in the doing of an insurance business.

A surviving partner is required to make a prompt and complete accounting as to all partnership assets in his possession in the court where the estate of a deceased partner is being administered. The surviving partner becomes, by the death of his partner, a trustee, in effect, of all the

not be possible for her and her partner to successfully succeed in instructing children if she were denied the use and possession of this data; and that the defendant's conduct constitutes a breach of our rule the contract in question, but also of an implied contract relating not of a fiduciary and confidential relationship between the parties.

It was provided in the contract that certain instructors priding registration options should be sent to the same firm as constituents and by discovery a letter; that the defendant and for fifteen months supplied such this constituents, but that thereafter they had refused to perform the functionality of this agreement.

Two principal questions are presented in an for decision: the first is, did such fiduciary relations exist between the parties as would oblige the complainant to the belief and confidence, moreover, are the claims of the petition as discussed in the contract of such character that a breach of equity will, in a consideration of the mentioned, compel the defendants to comply with the terms and stipulations.

It is urged by complainant that the defendants were under a fiduciary obligation arising from the confidential of the contract to permit the complainant free access to and use of the distributing theater. This argument is based upon the fact that such complainant's business consisted and depended in, relied for many years and been particular in the giving of an instructor business.

A material feature in complaint is made a change and complete management as it all pertinent events in the transaction in the court where the rights of a business partner in point administrated. The material giving between, by the death of his partner, a theatre, in effect, of all the

interests of such deceased, at the time of his death, in the partnership assets for the benefit of those entitled to a distributive share of the deceased partner's estate. Andrews v. Stinson, 254 Ill., 111. There is strong support in authority for the contention that a surviving partner sustains a fiduciary relationship toward the representatives of the deceased partner which prohibits him from deriving any personal benefit from a deceased partner's interest in the partnership assets at the expense of such representatives. Bauchle v. Smylie, 104 N. Y. App. Div. 513.

We are unable, however, to see how complainant can derive any advantage from an acceptance of the principles laid down by the above authorities. The parties in this case, in fact, settled their differences by the execution of a written agreement and the legal rights of each became merged in this contract. It is assumed that the complainant, could, before the execution of the contract, have compelled an accounting on the part of Charles E. Affeld; she had full power to adjust, as she did, with the surviving partner her rights, if any, to an accounting, and even if we should assume that the surviving partner did in fact refuse to comply with a fiduciary obligation imposed by his partnership relation, his conduct in this particular must be held to be not material in determining the present controversy, for the reason, as stated, that the complainant had by the execution of a formal contract entered into an agreement which expressly defines and fixes her rights in and to the records in question. This is not a suit between partners, and, as we view the allegations of the bill, the contract in question does not impose any fiduciary obligation upon the parties. We are of the opinion that there is much force in the contention that the underwriting records and the good will of the business were not assets capable of

instructs of such dependence, at the time of his death, to the permanently secure for the benefit of those entitled to a tax-exclusive share of the deceased patentee's estate. Helvering v. Safe Deposit, 308 U.S., 313. There is strong support in authority for the contention that a surviving partner purchase a fiduciary relationship insofar his representatives of the deceased partner which partnership may properly consist from a deceased partner's interest in the individual assets of the expense of such representatives. Dougherty v. Commissioner, 2d Cir., July, 1943.

In the instant, however, he was not individual can secure any advantage from an discharge of his principle task assigned by the above decision. The partner is this case, in fact, acting solely attorneys by the executrix of a written authority for the legal rights of paid trustee during in such business. It is assumed that the contention, still, before the creation of the business, have contributed no in-counting on the part of creditor; or, if there, not but that pass to object, as the rule, with the surviving partners the rights, if not, in no accounting, and even if the single claims the surviving partner has in this petition to modify with a fiduciary obligation imposed by the particularly violation, his counsel is also unfortunate when he fails to be not involved in determining the partner's contribution. For the reason, or means that the contribution and by the creation of a trust relation's estate into an unknown total expressly distinct and from the right to act in the phrase of operation. This is not a suit between partners, and, as the allegation of the bill, the testimony in support fails to income for fiduciary obligation upon the partner. In act of the phrase that there is no contention that the surviving partner and the good will of the business have had never ceased of

sale and that the surviving partner was not required to inventory these records and sell the same and distribute the proceeds. At the time the contract in question was executed a real controversy did exist between the parties which furnished a sufficient consideration for its execution, and such rights as either may have in the subject matter of this litigation must be determined from the contract itself. It expressly provides that it was entered into for the purpose of preserving the good will of the business formerly conducted by Witkowsky & Affeld and to avoid wasteful competition and injury to the business of the parties to the contract. It was to be binding upon the successors and assigns of the parties in the business which is separately conducted by them.

The contract provided that Charles E. Affeld would fully account to the Probate Court for all of the furniture and fixtures belonging to the former partnership; that the defendant, Charles E. Affeld, had a two-thirds interest and the deceased partner had a one-third interest in such fixtures and furniture, and that said Affeld was not to inventory in the Probate Court, as a partnership asset, the underwriting records; that all records, etc., of the partnership were to be held in the care and custody of Affeld, Tonk & Co., and that -

> "for the purpose of completing the records of the firm of Witkowsky & Affeld, all the parties hereto shall cause to be inserted or placed in the proper place in the records of said Witkowsky & Affeld a complete underwriting record of all policies or business renewed by any of the parties hereto during the period from April 2, 1914, to the date of this contract; that so long as either of the present members of the firm of Witkowsky & Co. is in the insurance business in Chicago, such member is to be given unrestricted access to and use of the underwriting records of Witkowsky & Affeld, in accordance with the following terms and conditions:"

It was also provided by the contract that representatives of the parties were to make examination at certain

sale and that the purchasing partner was not required to inventory stock towards and sell the same and distribute the proceeds. At the time the contract in question was concluded a real conveyancy did exist between the parties which furnished a sufficient consideration for its execution, and such rights as either may have in the subject matter of this litigation must be determined from the contract itself. It expressly provides that it was entered into for the purpose of preserving the good will of the business formerly conducted by Ellis owing a difficult and to avoid wasteful competition and injury to the business of the parties to the contract. It was to be binding upon the successors and assigns of the parties to the business which is separately conducted by them.

The contract provided that Charles T. Ellis would fully account to the Trustee herein for all of the furniture and fixtures belonging to the former partnership; that the defendant, Charles T. Ellis, had a two-third interest and the deceased partner had a one-third interest in such fixtures and furniture, and that such Ellis was not to interfere in the trustee's court, or a petitioner herein, the undertaking results; that all records, etc., of the partnership were to be held in the sole and custody of Ellis; that a to., and that -

"For the purpose of completing the records of the firm of Ellisonby & Ellis, all the parties hereto shall cause to be inserted or placed in the proper place in the records of such ellisonby & Ellis a complete undertaking showing of all policies of business issued by any of the parties hereto during the period from April 2, 1924, to the date of this contract; that to keep as either of the present members of the firm of Ellisonby & Co., is to be the business business in future, such member is to be given unrestricted access to and use of the aforesaid records of Ellisonby & Ellis, in accordance with the following terms and conditions:"

It was also provided by the contract that before

completion of the priting work to make complication of certain

times of the underwriting records, with stated exceptions, and that all the policies expiring during the month for which these examinations were to be made were to be classified so as to identify those policies which were to be regarded as the business of the defendants from those which, before his death, had been controlled by Conrad Witkowsky, "or are now controlled by Pauline Witkowsky or James Witkowsky." It was agreed that those policies about which the parties could not agree were to be identified as "office business"; that each of the parties to the contract was to have the sole use of the records of the business designated by the name of such party and the parties were permitted to compete, with stated limitations, for other classes of business.

It was provided that all future cancellations of policies included in the underwriting records -

> "of Witkowsky & Affeld shall be left in the files in order that they may be discovered by said James Witkowsky and Albert E. Tonk in making the said monthly examination, and the said Affeld, Tonk & Co., shall promptly give to said Witkowsky & Co. information of such change of date or expiration of any such policies."

Counsel for complainant insist that a fiduciary relationship did exist which would authorize the court by mandatory injunction to enforce the provisions of the contract, and it is argued that because the intention of the parties, as expressed in the contract, was to preserve for the common benefit of each the good will of the business of Witkowsky & Affeld and to prevent wasteful competition and injury to the business and reputation of the parties, the court, by decree, will enforce a performance of the contract.

We do not agree with this contention. The contract is a somewhat intricate one in its nature, but as we read it, the parties had agreed upon a definite use and method of preserving the records made by the firm of Witkowsky & Affeld. This contract, as we view it, does not establish a

times of the undersigning seconds, with stated exceptions, and that all the politics applying during the month for which these observations were to be made were to be classified as to identify those politics which were to be regarded as the basis of the information from those which, before his death, had been controlled by general directory, "or are now controlled by leading citizenry or local citizenry." It was agreed that those politics about which the politics could not after were to be classified as "other business"; that each of the politics on the contract was to have the sole use of the records of the business developed by the case of each party and the parties were permitted to compete, with stated indications, for other classes of business.

It was practice that all future consolidations of politics included in the undersigning records -

"of itsenger a litera shall be left in the files in order that they may be discovered by each issue [illegible] and also [illegible] in making the [illegible] consolidation, and the said affil. Party c [illegible] shall promptly give to said [illegible] c. [illegible] of such change of name or [illegible] of any such [illegible]."]

Counsel for complainant insist that a [illegible] relationship its other which would substitute the right to [illegible] information to afforde the protection of the [illegible], and it is agreed that because the information of the parties, as expressed in the contract, was to [illegible] for the [illegible] benefit or even the good will of the business of [illegible] within the [illegible] competition and injury to the [illegible] and reputation of the parties, the [illegible], by [illegible], will [illegible] a [illegible] of the [illegible].

It is not [illegible] with this [illegible]. The [illegible] that is a [illegible] [illegible] in its nature, but as we read it, the parties had agreed that a [illegible] and [illegible] of [illegible] the [illegible] made by the firm of [illegible] [illegible]. This contract, as we view it, does not [illegible] a

fiduciary relationship between the parties. It does require, of course, either expressly or impliedly, a faithful and complete performance by each of the parties of the promises and covenants made in the contract, but this much may be said of every contract. It did not provide for the creation of such confidential and trust relationship between the parties as that it can be said that either had become thereby in any sense a trustee for the other. The controversy originally arose over the claimed rights of the parties to use the underwriting records. It is said that Charles E. Affeld claimed the exclusive right to the use of such records and that complainant insisted upon the right of a joint use thereof. This controversy resulted in the making of the contract. It is urged that the parties had placed upon the contract, for a period of fifteen months after its execution, a construction opposed to that which the defendants now insist should be given to it, and it is said that the bill is more than a bill to enjoin a breach of a contract; that it is in fact an appeal to the court to enjoin "the gross violation of the duties which the defendants owe Mrs. Witkowsky, both under the contract and aside from the contract." It does not appear from the bill whether the defendant, Charles E. Affeld, as provided in the contract, ever accounted to the Probate Court. For aught that appears, the surviving partner may have had, on a settlement of the partnership estate, a valid claim against his deceased partner's interest therein, and if such be the case, then he would have had a lien upon all partnership assets. The parties agreed in the contract that the defendant, Charles E. Affeld, was not to inventory the partnership records as an asset of the partnership, and there is authority for the contention that an insurance agency has no good will and that its records are not assets

capable of reduction to a money value. Whitney v. Whitney, 115 Ky. 552. Hirschberg v. Bacher, 159 Wis. 207. An examination of the bill convinces us that while the records in question in this case were of much aid to the parties to the litigation in the matter of acquiring new business, it cannot from this fact alone be concluded that the records were of such property value as that the right to such use of them under the contract will be enforced by mandatory injunction.

It is urged that the words "unrestricted access" as they appear in the contract, did not give to complainant an unlimited right to use all the records of Witkowsky & Affeld. This right is expressly limited in the contract in accordance with "the following terms and conditions;" The terms and conditions referred to are set out in several paragraphs of the contract and clearly limit complainant's use of the records to certain classes of records, the more important of which were designated as "Witkowsky business" and "office business." It is also insisted that defendants failed to enter on the records all the information that came to them with respect thereto; that they had failed to note on the policies changes of location of the property insured or of the ownership thereof. The contract does not require these notations on the policy. The language of the contract is -

> "all of the parties hereto shall cause to be inserted or placed in the proper place in the records of said Witkowsky & Affeld, a complete underwriting record of all policies or business renewed by any of the parties hereto during the period from April 2, 1914, to the date of this contract."

This language expressly limits this service "during the period from April 2, 1914, to the date of this contract," May 20, 1914, and we are unable to find any language in the contract which supports the contention of counsel that this service relates to any period of time other than that defi-

nitely fixed by the language of the contract above quoted. Where the language used in a contract is ambiguous or its meaning doubtful, the court may, under well established rules and limitations, have resort to other aids than the language employed in the contract to determine its meaning, such, for instance, as the interpretation placed upon the contract by the parties themselves or by their conduct under the contract. These aids will not be resorted to where the language of the contract is clear and its meaning not doubtful. The language of the paragraph of the contract last above quoted is not uncertain.

The contract in question is inherently of such nature as renders it impossible to enforce its provisions by a decree of a court of equity as prayed for in the bill of complaint. The contract is lengthy, and it, in substance, requires a joint use of certain records and the performance by the defendants of certain services. It is prayed in the bill that monthly expiration notices of all policies upon which the complainant should desire notices should be given to her and that such notices should state all information which has in the past, or shall in the future, come to the defendant relating to such policies, be delivered to the complainant. In Ulrey v. Keith, 237 Ill. 284, the court said:

> "It does not follow that to hold the lease a valid contract necessarily implies or carries with it the right to enjoin the lessors from violating it. As to very many valid contracts, equity will not interfere to enforce their performance or to prevent their violation. It should be borne in mind also that there is a distinction in equity between a mutuality in the obligations of contracts and a mutuality of remedy under them."

And in Bauer v. Lumaghi Coal Co., 209 Ill. 316:

> "The specific performance of a contract is not a matter of absolute right, even upon a case made by the proofs, but depends upon well understood rules and principles applicable to the facts and circumstances of each case. The contract

> in itself must be reasonable, fair, just, mutual, certain and unambiguous; and after these requirements have been established, whether or not the performance of the contract shall be decreed rests in the sound discretion of the chancellor."

Here it is sought to enjoin the defendants from doing certain things and by mandatory injunction to compel them to perform other things specified in the contract. The bill, in its essence, is one to prohibit a breach of a contract and also for the specific performance of certain things which the complainant insists she is entitled to. As to the propriety of the remedy sought by the complainant, it may be noted that the records in question were to be held by Affeld, Tonk & Co., so long as they "desire to retain possession of said records." This provision would seem to give the defendant th e right, by giving up possession of the records, to, in effect, nullify the contract.

A contract will not be enforced by specific performance where, from its provisions, it may be seen that the court would not be placed in a position where it could effectually enforce its decree with respect thereto. To enforce the contract in question would necessarily require the court to supervise a considerable portion of the business and transactions of the defendants before it could determine whether its orders had been complied with. While the court is not permitted arbitrarily and in a proper case to refuse to grant the same relief to an injured party as is prayed here, the court may, in its discretion, deny such relief where the remedies of the parties under the contract would not be mutual, or where the granting of such relief would compel the performance of personal services. The contract under consideration does not, as said, create such a confidential relationship between the parties as that it can be

It itself must be transmitted, fair, just, natural, without and punishment; and after these requirements have been satisfied, whether or not the performance of the man- first must be observed varies in the sound it emitts of the transmitter.*

Here it is easier to obtain the deferentia from being certain things and by mandatory injunction to compel them to perform other things specified in the contract. The fall, in its essence, is one to provide a branch of a contract and also for the specific performance of certain things which the complainant indeed has a willing to. As to the propriety of the remedy sought by the complainant, it may be noted that the remedy in question were to be held by affect, then a c., as long as they "desire to obtain possession of said remedy." This provision would seem to give the defendant in a right, by giving up possession of the remedy, in, in effect, nullify the contract.

A contract will not be enforced by directing performance where, from the provision, it may be seen that the court would not be placed in a position where it would effectually enforce its decree with respect thereto. To enforce the contract in question would necessarily involve the court to supervise a considerable portion of the business and transactions of the defendants before it could determine whether its orders had been complied with. While the court is not prohibited absolutely and in a proper case to enforce a contract the same relief to an injured party as is granted here. The which you, in its discretion. Only such relief specification provided of the parties under the contract would not be obtained, or where the granting of some relief would compel the performance of personal services. The contract must contemplation has not, as yet, shown that a reciprocal relationship between the parties so that it can be

said the defendants became trustees for the benefit of the complainant, and requiring, as it does, the performance of personal service by the defendants, the decree of the Circuit Court will be affirmed.

AFFIRMED.

and the determine whether certain the for [illegible] of the conditions, and [illegible], in it case, the performance of [illegible] relative to the [illegible], the [illegible] of the [illegible] power will be affected.

[illegible]

122 - 23079

208 I.A. 201

FREDERICK W. RESTORICK,
Appellee,

vs.

JOHN W. RESTORICK,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in attachment and recovered judgment against the defendant in the Municipal Court of Chicago.

From the evidence heard on the trial it appears that the plaintiff and defendant are brothers and that they each had received a legacy of 300 pounds payable out of the estate of their deceased father, who died in 1902, in England. In his testimony the plaintiff stated that he had not received the 300 pounds bequeathed to him by his father; that his brother Jack had "received something from the estate."

In the year of 1912, the defendant, then a resident of England, mailed a letter to his brother, the plaintiff, which was introduced in evidence. That part of the letter material to the present inquiry is as follows:

> "I have been and seen Mr. Mortimer about the money matters, and I nearly settled up after a lot of trouble and a big expense. I have got a cottage for you and some money, about 150 pounds. The cottage is valued at 110 pounds, so I want you to answer this letter by return of post and let me know your correct address and what you want me to do with the house and then I will send you on a check for the lot, as I am sure you can do with it."

After this letter had been received in evidence, counsel for plaintiff, over the objection of defendant, introduced oral testimony of the contents of two letters which he had sent to his brother after receipt of the letter from England. Testifying as to the contents of these letters the plaintiff said that on July 15, 1912, and again on October 20, 1912, he, the plaintiff, had requested his brother to send him 150 pounds. The testimony of the defendant was taken by deposition and therein he stated that he had only received, out of the estate of his father, in money, the sum of 172 pounds, which was paid to him in July, 1912; that that was all the money he had ever received from his father's estate; that he did not, on July 15, 1912, or at any other time, receive 150 pounds for his brother; that he had never retained any money belonging to the plaintiff and had never promised in any way to give 150 pounds, or any other sum, to him out of the money received from the estate.

It is insisted on behalf of the defendant that the court erred in admitting oral evidence of the contents of the two letters which the plaintiff said he had written to the defendant. We think it was error, under the circumstances, to admit this oral testimony. The case presented by the plaintiff was not at all strong and it was based entirely upon the admissions in the letter which he had received from his brother. This letter stated in substance that the defendant had been to see a Mr. Mortimer, who was, we infer, a trustee under the will of the deceased father, about money matters, and that the defendant had nearly settled up, after some trouble and expense. The defendant states in this letter -

after this letter had been received in evidence, counsel for plaintiff, over the objection of defendant, introduced oral testimony of the contents of the letters which he had sent to the defendant after receipt of the letter from Dayton. Testifying as to the contents of these letters the plaintiff said that on July 12, 1922, and again on October 20, 1922, he, the plaintiff, had requested his brother to send him 120 pounds. The testimony of the defendant was taken by deposition and therein he stated that he had only received, out of the series of six letters, in money, the sum of 272 pounds, which was paid to him in July, 1922; that that was all the money he had ever received from his brother's estate; that he did not, in July 12, 1922, or at any other time, receive 120 pounds for his brother; that he did not intend any such misleading by the plaintiff and had never promised in any way to give him pounds, or any other sum, in lieu of the money plaintiff gave the estate.

It is insisted on behalf of the defendant that the court erred in admitting oral evidence of the contents of the two letters which the plaintiff said he had written to the defendant. By virtue of the action, under the circumstances, to admit this oral testimony. The only presumption by the plaintiff was not as all strong and it was based entirely upon the admission in the letter which he had received from his brother. This letter tended to substantiate that the defendant had been in see a Mr. Blackmer, who was, at bottom, a trustee under the will of the testator father, which merely motive, and that the defendant had actually written, after some trouble and expense. The defendant claims in this letter -

> "I have got a cottage for you and some money, about 150 pounds. The cottage is valued at 110 pounds, so I want you * * * to let me know * * * what you want me to do with the house and then I will send you on a check for the lot."

Plaintiff admits that in October, 1912, he requested his brother to sell the cottage and that the cottage was sold and that he, plaintiff, received 110 pounds therefor. A careful examination of the letter received by plaintiff does not disclose that the defendant expressly stated therein, or that he meant to state, that he had in fact received 150 pounds of the money belonging to the plaintiff. The letter is not altogether free from ambiguity and it is quite possible that the 150 pounds referred to therein was not legally the money of the plaintiff; nor it is clear that the defendant meant to charge himself with the receipt of the money at the time he wrote the letter. The language is, "I have got a cottage for you and some money, about 150 pounds." When the sentence in the letter which immediately proceeds the last quoted sentence is read it might be inferred that the defendant used the expression "have got" as meaning that he had arrived at an adjustment of the matter with Mr. Mortimer. The promise of the defendant to send a check for the lot does not aid much in clearing the matter from doubt.

There is no evidence in the record from which we can say that the estate had ever been settled, or what sum, if any, there was due the plaintiff out of the estate of his deceased father.

The defendant, at the time this deposition was taken, was serving in the British Army at the war front. We think in the interest of justice he or his counsel should be given an opportunity to produce the letters which plaintiff says he mailed to the defendant and also to explain the

> "I have got a message for you and some money, about 150 pounds. The message is written on 150 pounds, so I want you - - - to let me see - - - what you want me to do with the money and then I will send you on a dance for the lot."

Plaintiff admits that in October, 1921, he re-quested his brother to sell the cottage and that the cottage was sold and that he, plaintiff, received 150 pounds therefor. A careful examination of the letter received by plaintiff does not disclose that the defendant expressly stated therein, or that he sought to state, that he had received 150 pounds of the money belonging to the plaintiff. The letter is not altogether free from ambiguity and it is quite possible that the 150 pounds referred to therein was not largely the money of the plaintiff; nor is it clear that the defendant meant to charge himself with the receipt of the money at the time he wrote the letter. The language is, "I have got a message for you and some money, about 150 pounds." That the sentence in the letter which immediately precedes the last quoted sentence is read it might be inferred that the defendant used the expression "have got" as meaning that he had received or on adjustment of the matter with Mr. Davidson. The promise of the defendant to send a check for the 150 does not aid much in identifying the matter from doubt.

There is no evidence in the record from which we can say that the parties had ever been settled, or even, if any, there was due the plaintiff out of the estate of his deceased father.

The defendant, at the time this deposition was taken, was serving in the British Army on the war Front. It could be the interest of justice to or the court should be given an opportunity to procure the testimony which plaintiff says he seeks in the defendant and also to explain the

ambiguities in the letter which defendant mailed to plaintiff. It is conceded that sufficient notice was not given to enable counsel for defendant to produce the letters at the trial.

Under the circumstances of the case, we think it was error to admit secondary evidence of the contents of these letters and that the judgment must be reversed and the cause remanded to the Municipal Court for a new trial.

REVERSED AND REMANDED.

332 - 23298

GEORGE W. GIST and WILLIAM M. GIST, doing business as GIST BROTHERS COMPANY,
Defendants in Error,

vs.

WYOMING LAND AND IRRIGATION COMPANY, a corporation,
Plaintiff in Error.

208 I.A. 202

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit in the Municipal Court of Chicago against the defendant and a judgment was entered in that court in favor of the plaintiffs for the sum of $71,302.75. The defendant seeks by writ of error to reverse this judgment.

The controversy between the parties arises from a contract dated April 25, 1908, which provided for the construction by the plaintiff for the defendant of two irrigation canals in Big Horn County, Wyoming, which were respectively known as Shell Creek Canal and Paint Rock Canal. The contract was in writing and it provided among other things that the plaintiffs were to receive for the excavation work to be performed by them certain varying prices depending upon the character of the material to be excavated, and it was provided that the amount and classification of such materials were to be estimated by defendant's engineer, whose decision was to be final and binding on the parties. The contract also contains a provision under which the defendant was permitted to retain 15% of

Appeal from the Circuit Court of Pulaski County.

Judgment affirmed.

Mr. JUSTICE DRUCK DELIVERED THE OPINION OF THE COURT:

Plaintiffs brought suit in the Municipal Court of Chicago against the defendants and a judgment was entered in that court in favor of the plaintiffs for the sum of $73,000.75. The defendants seeks by writ of error to reverse this judgment.

The controversy between the parties arises from a contract dated April 22, 1966, which provided for the construction by the plaintiff for the defendant of two irrigation canals in Pulaski County, Illinois, which were respectively known as Shell Creek Canal and Lake Creek Canal. The contract was in writing and as previous court after finds that the plaintiffs were to receive for the construction work to be performed by them various varying prices depending upon the character of the material to be excavated, and it was provided that the amount and classification of such materials were to be estimated by defendant's engineer, whose decision was to be final and binding on the parties. The contract also contains a provision under which the defendant has obtained the dismissal of the suit's engineer, whose decision was to be final and binding on the parties. The contract also contains a provision under which the defendant has obtained the dismissal of the

the cost of the work to be done under the contract until the final completion of both canals.

The evidence heard indicates that at the time the contract was made the defendant intended, by the construction of the canals in question, to irrigate 70,000 acres of land which it held in Wyoming.

The work required under the contract on the Shell Creek Canal was completed, and as a part of such work the plaintiffs also enlarged part of a lateral ditch described as the Price-McDonald Ditch.

It is not seriously contended that the defendant was not indebted to the plaintiffs in the sum of $17,111.78 at the time suit was brought for the balance due for the work of excavating the Shell Creek Canal and the lateral ditch.

The case was tried before a jury in the Municipal Court, which rendered a verdict in favor of the plaintiffs for the sum of $70,000, and the substantial controversy here between the parties is as to whether $52,999.22 of this sum was legally due the plaintiffs by the defendant. It is conceded that no work was done by the plaintiffs under the contract on Paint Rock Canal; their contention is that they were prevented by the defendant from performing this part of the contract, and that they had, because of this conduct on the part of the defendant, lost large profits which would otherwise have accrued to them had they been permitted to complete the contract in accordance with its terms.

It was provided in the contract that the

The duty of the vendor to be good under his contract until the final completion of such grading.

The evidence bears testimony that at the time the contract was made the defendant intended, by the construction of the canal in question, to irrigate 70,000 acres of land which it held in Dywelay.

The work executed under the contract on the small green land was completed, and as a part of such work the plaintiffs also constructed part of a lateral ditch described as the "Pike-Dywelay ditch".

It is not seriously contended that the defendant was not indebted to the plaintiffs in the sum of $17,117.75 at the time suit was brought for the balance due for the work of constructing the small green land and the lateral ditch.

The case was tried before a jury in the municipal court, which rendered a verdict in favor of the plaintiffs for the sum of $17,[illegible], and the municipal court-of-error then entered the judgment in the trial court, as of this date, on the identity of the defendant. It is uncontested that no writ was issued by the plaintiffs under the contract on their part. Their contention is that they were prevented by the defendant from performing this part of the contract, and that the failure of this product in the part of the defendant, because of this product in the part of the defendant, that their proof was which would substantiate their contract to accommodate with the terms.

It was argued in the contract that the

plaintiffs were to do the work therein described in accordance with certain plans, maps and written specifications to be made by defendant's engineer, after the contract was executed. No such plans, maps or surveys were made by defendant's engineer, and the plaintiffs assert that under an oral agreement with defendant's agent they, the plaintiffs, were directed to construct Paint Rock Canal along a surveyed line or center stakes, known as the High Line, which line plaintiffs assert was agreed upon by the parties prior to the execution of the contract, and that the plaintiffs were directed by defendant's agent, orally and in writing, as to the line of stakes and the widths and depths at which Paint Rock Canal was to be constructed.

It is insisted that the verdict in favor of the plaintiffs was manifestly against the weight of the evidence and that the evidence fails to show that the plaintiffs would have made any profits had they completed the construction of Paint Rock Canal. It is contended on behalf of the plaintiffs that the defendant caused damage to the plaintiffs by a fraudulent classification of materials excavated on the Shell Creek Canal; by a loss of profits which would have accrued to the plaintiffs had they not been prevented by defendant from constructing the Paint Rock Canal, and for certain percentages of the total amount due the plaintiffs for work performed under the contract which were retained by the defendant. While there is dispute between the parties as to the other matters in controversy, it is apparent that the real conflict between them is as to what amount, if any, should be allowed the

2.

plaintiffs in connection with that part of the contract relating to the Paint Rock Canal.

The jury, by its answers to special interrogatories, found that the defendant had agreed with the plaintiffs, at the time of, or prior to, the execution of the contract, that the proposed Paint Rock Canal was to be constructed along the line as contended for by the plaintiffs.

The evidence shows that the plaintiffs were at all times willing and able to construct the Paint Rock Canal, and that they frequently, after the execution of the contract, requested to be permitted to complete this work.

In the making of the contract the parties were represented by George W. Gist, the plaintiff, and Wm. L. Rohrer, General Manager of the defendant. The evidence tends to prove that Rohrer, at a meeting in Chicago in the Spring of 1908, informed Gist that the defendant was ready to make a contract for the excavation of the Shell Creek Canal. Gist testified that he refused to consider a contract for the small canal; that in the course of discussion Rohrer said to Gist that the construction of the system would require the excavation of 2,500,000 yards of earth, 180,000 yards of shale and 300,000 yards of sand rock. The testimony of Gist is to the effect that he refused to have anything to do with the contract unless he was given a contract for the excavation of both canals.

Following the meeting in Chicago correspondence was had between the parties, from which it is

apparent that the defendant was anxious for the construction of the Shell Creek Canal, but in a letter to Gist, Rohrer intimated that he would be willing to negotiate with him for the construction of the entire irrigation system. Following this correspondence Gist and his engineer went together to Basin, Wyoming. On the way out Gist and his engineer say Rohrer produced a map taken from a railroad folder, and said to Gist, "See, here we have our Paint Rock Canal shown on the Burlington folder." This map shows a staked-out route called the High Line, but it does not show the so-called Starrett Line or the Low Line, which the defendant's witnesses claim were also in contemplation as the line for the Paint Rock Canal. The parties, Rohrer, Gist, and Johnson, the plaintiffs' engineer, went together over a part of the Paint Rock Canal.

Gist testified that Rohrer pointed out to them the direction of the proposed line and outlined in detail its general location. Gist says that he, at this time, walked over a part of the line where it passed through a ridge, and that he could see the line from either side of this ridge, and that it was all staked out with center stakes, 100 feet apart, with the number of the station and the depth of the proposed canal inscribed thereon. Rohrer, for the defendant, said that he took Gist and Johnson over a part of the line, but did so for the purpose of introducing them to one Emerson, who was to accompany them over the Shell Creek work the next day; that the part of the line for the Paint Rock Canal which he examined with Johnson and Gist was that

part which was common to the Starrett and the High Line, and a third line, called at the trial the Low Line, which Rohrer testified the defendant had in mind at the time the contract was made. The route of the Starrett Line was indicated by triangulation stakes. These stakes were set 500 feet apart, and indicated the general course of the proposed Starrett Line.

The weight of the evidence is to the effect that the Starrett Line was impracticable because of certain "gyp" formations and that it was abandoned by the defendant.

On the evening of the day that the persons mentioned examined a part of the Paint Rock Line they again met, and either Rohrer or Emerson produced a profile drawing and map; Gist says that they were given to him for the purpose of estimating the quantities and classifying the work on the Paint Rock Canal; that Emerson also gave them the side slopes and the depth and width of the bottom of the canal from the headgate down to the terminus; that Gist took this data and recorded it in a book, which was produced at the trial. The profile showed a vertical section indicating the depth of the cut of the canal along its center-line from the surface of the earth to the bottom of the canal from its headgate near the eastern terminus of the canal at Lodge Creek to a point about twelve miles from its western terminus, a distance of about 52 miles. Gist testified that Emerson gave him the average width and depth for the western 12 miles of the canal; that with all of the data given him he was enabled

part with the ground to the interest and the high line, and a third line, rolled at the right the low line, which further facilitated the movement but is said at the time the quarter was made. The depth of the interest line was limited by topographical studies. These studies were not all just equal, but indicated the general course of the proposed railway line.

The weight of the evidence is to the effect that the surveyed line was impracticable because of certain "gap" formations and that it was abandoned by the inventor.

In the opinion of the judge that the witness mentioned examined a part of the right hand line that ought to be, and without knowing or intending to produce a partial examination that that ought were given in aid for the purpose of ascertaining the quantities and classifying the work on the right hand line; that therefore also gave them the site angles and the depth and width of the bottom of the wood from the examiner down to the beginning that that site down and measured it in a week, which was presented at the trial. The partie showed a vertical section indicating the depth of the cut of the wood along its centre-line from the surface of the ground to the bottom of the wood from the beginning near the western terminus of the wood at ledge down to a point about twelve miles from its western terminus, a distance of about 48 miles. This indicated that between gave the the maximum depth and depth for the western 12 miles of the wood; that depth all of the work first six so was changing

to and did figure upon the doing of the excavation work for the entire system of irrigation canals that the defendant proposed to build.

The evidence is in important particulars directly contradictory. The plaintiffs insist that the defendant, through its engineer, who was made the arbiter as to the quantity and kind of material to be excavated by the plaintiffs in the Shell Creek Canal, defrauded the plaintiffs in respect to the kind of material determined by him to have been excavated.

While it is true that under the terms of the contract the defendant's engineer was to prepare plans, maps, and written specifications for the work, and that the defendant had the right under the contract to determine the order in which the work was to proceed, a fair construction of the contract would require the defendant to proceed with reasonable diligence with the preparation of plans necessary for the doing of the entire work.

The second paragraph of the contract expressly provided for the building of both the Shell Creek Canal and Paint Rock Canal, and there is but little doubt from the evidence that the plaintiffs were invited to figure on the work on the basis that it included the excavation of both canals. The contract specifically provides also that the work was to be completed by the plaintiffs by the 17th day of May, 1910, unless the time for such completion was by mutual agreement extended, and also unless the plaintiffs were delayed in the doing of such work by the failure of defendant's engineer to deliver the specifications, maps, plans, etc., in which event the plaintiffs were required to

promptly notify the defendant of the delay and an allowance of time to complete the contract was to be made to the plaintiffs equalling the period said work "shall be so stopped for said cause." The work was to be begun on the 16th day of May, 1908, and was to be completed, with the limitations above indicated, on the 17th day of May, 1910, and the rate of progress was to be satisfactory to defendant's engineer.

Section 18 of the contract provided that if the work was not begun with an adequate force and equipment at the time specified, the defendant had the right to call for new bids and make a new contract, and in such event the plaintiffs were to pay the defendant as liquidated damages the sum of $5,000. Other substantial penalties were provided for in the contract, and from its terms and the evidence heard upon the trial it is certain that the plaintiffs entered into an agreement which required them to assume large expenses and serious responsibilities on the definite understanding that the defendant would complete the construction of both canals. Under the contract the plaintiffs were to be paid on the 20th day of each month for work performed under the contract up to the preceding 15th day of each month, except that the defendant was permitted to retain 15% of such amount, not to exceed $45,000, until the completion of all the work required under the contract to the satisfaction of defendant's engineer.

The chief controversy concerns the question of whether the defendant had by its conduct prevented

primarily satisfy the requirements of the latter and as altogether of time to complete the undertaking and to be ready to the plaintiffs supplying the required well work 'really so as charged for said cause.' The work was to be begun on the first day of May, 1892, and was to be completed, with the limitations above indicated, on the 15th day of June, 1892, and the date of completion was to be satisfactory to defendant's engineer.

Besides the of the contract provided that if the work was not begun with in stipulate time and continued at the time specified, the defendant has the right to call for new bids and make a new contract, and in such event the plaintiffs were to pay the difference as liquidated damages the sum of $3,000. Other stipulations provided were material for in the contract, and time was taken and the evidence showed upon the trial it is certain that the plaintiffs entered into an agreement which provided that to secure large quantities and various requisitions of the defendant understanding that the defendant would use its the materialmen of with manufa. Under the contract the plaintiffs were to be paid on the 25th day of each month for work performed during the preceding and to be the preceding 15th day of each month, although that the defendant was permitted to retain 15% of each month's, and to deduct 15% of the contract price, until the materials of all the work furnished under the contract to the satisfaction of defendant's engineer.

The court accordingly rendered its decision of dismiss the defendant had by the contract prevented

the plaintiffs from performing the excavation work upon the Paint Rock Canal.

The evidence relating to this question is very voluminous, and in some particulars is directly contradictory. We have examined this evidence, and we are of the opinion that it supports the contention that the plaintiffs stood ready at all times to perform their part of the agreement; that the defendant refused and neglected to complete the contract, probably through lack of means, and that the plaintiffs were legally entitled to recover whatever profits, if any, would have accrued to them had they been permitted to prosecute and complete the work required for this canal, which represented much the larger portion of the work to be done under the contract; and when consideration is given to the character of this work, the place where it was to be performed, the necessary expenses incurred in procuring and transporting labor, material and equipment to the place where it was to be performed, and the further fact that the prices agreed upon for the excavation provided for by the contract were for the completion of both canals, it is obvious that plaintiffs had good reason to complain of the refusal or inability of the defendant to continue and complete the contract.

The plaintiffs were directed to first complete the Shell Rock Canal. While this work was in progress George W. Gist requested Emerson, the engineer, to set certain slope stakes for the Paint Rock Canal work. The engineer, according to Gist, said he would prepare the Paint Rock Canal for work by the first of June, 1908. In June, 1908, Emerson, the engineer, delivered the profile

the plaintiffs from performing the excavation work upon the plaintiff's land.

The evidence relating to this question is very voluminous, and in some particulars is directly contradictory. It has occupied this court, and we are of the opinion that it supports the conclusion that the plaintiffs about early of all times to perform their part of the agreement; that the defendant refused and neglected to complete the contract, primarily through lack of means, and that the plaintiffs were largely responsible to procure someone performing, if any, would have accrued to them but they have permitted to procrastinate and neglect the work required for this cause, this represented much the larger portion of the work to be done under the contract; but upon consideration is given to the character of this work, the place where it was to be performed, the necessary expense incurred in procuring and transporting labor, material and equipment to the place where it was to be performed, and the further fact that the prices agreed upon for the consideration provided for by the contract were for the completion of both objects, it appears that plaintiffs and just reason to complain of the refusal or inability of the defendant to continue and complete the contract.

The plaintiffs were directed to first complete the small tank first. While this work was in progress Davis V. Dyer requested Dwyer, the engineer, to set certain stake marks for the other tank small work. The engineer, consisting to act, made no work prepare the tank much sooner for work by the first of June, 1908. In June, 1908, however, the engineer, indicated the profile

and map heretofore referred to, to Johnson, employed by the plaintiffs, who testified that they were given to him for the purpose of enabling subcontractors to examine and bid on the work. Emerson admitted, on the witness stand, that he delivered the map and profile to Johnson, but asserted that he then said to Johnsonthhat he was taking a chance in showing the work to the subcontractors, as at that time it had not been decided on which line Paint Rock Canal would be built. Following this conversation several subcontractors examined the line shown on the profile and map for the Paint Rock Canal, and contracts for the construction of all but 12 miles of this work, which plaintiffs reserved for themselves, were entered into by plaintiffs with subcontractors, one of whom camped on the line of the work and remained there for several days, but was unable to proceed with the work because defendant had not set the slope stakes. Foley, one of the subcontractors, testified that Emerson said to him that he did not believe the plaintiffs would construct the Paint Rock Canal, but that they (defendant) intended to do it by subletting, etc. Other evidence of the same general purport was introduced which tended to show that in 1908 the defendant had concluded to prevent the plaintiffs from completing the larger canal. No work was done after the completion of the Shell Creek Canal in July, 1909.

In July, 1909, G. W. Gist, with a representative, met Rohrer in Chicago. Gist testified that Rohrer told him the company was without funds and could not go ahead with the Paint Rock Canal; that the defendant would not pay

and map boundaries referred to, so doubtful, relying by the plaintiffs, who testified that they were given to him for the purpose of causing subcontractors to examine and bid on the work. Between whether, on the stipulated point, that be delivered the map not prior to letting, but asserted that he then said to defendant's so was letting a contract in advance the work to the subcontractors, as at such time it had not been decided on which line that book Canal would be built. Deciding this controversial matter, subcontractors examined the line shown on the profile and map for the point Rock Canal, and contracts for the construction of all but 11 miles of this work, which plaintiffs reserved for themselves, were entered into by plaintiffs with subcontractors, one of whom engaged on the line of the work and remained there for several days, for was ready to proceed with the work because defendant had not set the stake stakes. Only, one of the subcontractors, testified that Dawson said to him that he did not believe the plaintiffs would construct the Point Rock Canal, but that they (defendant) intended to do it by mortgaging, etc. Other evidence of the same general nature was introduced which tended to show that in fact the defendant had contracts to prevent the plaintiffs from completing the larger canal. No work was done after the completion of the Bull Creek Canal in July, 1902.

In July, 1902, d. g. Cole, was a representative, not lawyer in Chicago. Cole testified that Dawson told him the company was without funds and could not go ahead with the Point Rock Canal; that the defendant would not pay

plaintiffs the balance due for the work done on the small canal unless plaintiffs consented to cancel the contract. Gist's testimony in these important particulars is corroborated by that of his representative, Denseen, and it is substantially denied by that of Rohrer.

On July 20, 1909, plaintiffs wrote the defendant a letter demanding an accounting and damages, if defendant did not intend to proceed with the work. Thereafter on July 27, 1909, defendant sent a letter to plaintiffs in which it stated that its engineer was then surveying Paint Rock Canal; that work would be begun on it not later than October 1st. In this letter certain reasons were stated for the delay and it was intimated that plaintiffs might proceed with the work on October 1st. Denneen testified that following the receipt of this letter, Rohrer, at Denneen's office, stated that the company had no money to go ahead with the Paint Rock Canal; that the work could not be done; that he was sorry for Gist, etc., and that he thought the company could borrow sufficient funds to pay plaintiffs for the work done on the Shell Creek Canal. On August 10, 1909, defendant wrote plaintiffs asking them if they would be ready to proceed with the work on the large canal by October 1st. The evidence shows that Johnson and G. W. Gist remained at Basin, near the work, until October 4, 1909, and that in the meantime no slope stakes had been set or other work done to get the line ready for work. On October 4, 1909, plaintiffs wrote defendant a letter in which they stated they were holding their force in readiness, in accordance with the instructions contained in the letters of July 27th and August 10th. To this letter Rohrer replied, by letter of October 20, 1909, that defendant had

taken Emerson, the engineer, off the Paint Rock work because of Gist's failure to answer their letters, and that it, the defendant, was willing to proceed with the work if plaintiffs would name a day, "about six weeks off when you will be ready to proceed," etc. To this letter the plaintiffs replied as follows:

> "Gentlemen:
> Your letter of October 20th. We are still waiting. Do not give us any more of this rare comedy. You seem to forget the efforts you have been making during the past few months to obtain a release from us of the work covered by our contract. Do not imagine that we consider ourselves obligated to reply to letters of the character of yours of the 20th or the letter mentioned therein. You have a contract with us and we expect you to live up to it.
> Yours truly,
> Gist Bros. Co.
> By Geo. W. Gist."

There was a sharp conflict in the evidence with respect to the attitude of the defendant in the matter of completing the Paint Rock Canal excavation. We think, however, that the weight of the evidence on this subject is decidedly in favor of the plaintiffs. It is not necessary to refer to all the evidence taken on the trial which deals with this question. The plaintiffs were engaged for about one year in excavating the Shell Rock Canal, and during all that time and for three months thereafter the defendant had taken no steps to definitely inform the plaintiffs of the location of the line for the large canal, except as heretofore stated.

We think the jury was authorized in finding that the letters of July 27, 1909, and August 10, 1909, were written by defendant with an evident purpose to build up a defense against any claims which might be made by the plaintiffs. There does not appear to be much sincerity in the position taken by the defendant that it did not know,

Under Jackson, the employer, all the Jews here became a of girls's factory in another city factors, and that is, the defendant, was willing to proceed with the work if plaintiffs would come a day, "about six weeks off when you will be ready to proceed," etc. On this letter the plaintiffs replied as follows:

"Gentlemen:

Your letter of October 2nd, we are still waiting. We are give us the date of this here comedy. You seem to forget the efforts you have been making during the past few months to obtain a release from us of the work covered by our contract. In fact longing than we another unreliable obligated to carry to lists- ture of the character of years of the kind or the lis- the manufacture Canada. You have a machinery with us and we expect you to live up to it.

Very truly,

Alex Stern, Co.

Mr. H. Hirt."

There was a sharp conflict in the evidence with respect to the attitude of the defendant in the matter of completing the joint back canal excavations. We think, however, that the weight of the evidence on this subject is decisively in favor of the plaintiffs. It is not necessary to pick or to fill the evidence upon the total which deals with this question. The plaintiffs were engaged for about six years in excavating the small ditch canal, and during all that time and for some months thereafter the defendant had been at pains to definitely relate the plaintiffs to the location of the line for the large canal, except as hereinafter stated.

On this the jury was authorized in finding that the letters of July 27, 1921, and August 2, 1921, were written by defendant with an evident purpose to avoid by a defense against any claims which might be made by the plaintiffs. There does not appear to be much ambiguity in the position taken by the defendant that it did not know,

subsequent to July 1, 1909, when the work on the small canal was completed, that the plaintiffs were ready to proceed with the work on the large canal. There is abundance of evidence in the record in support of the contention of the plaintiffs that at all times since and before the completion of the small canal it stood ready to go on with the balance of the work provided for in the contract. The evidence shows that the plaintiffs and certain of the subcontractors, with equipment, etc., remained practically idle from July 1st until October 1st, and it is unreasonable to suppose, under such circumstances, that plaintiffs were not anxiously waiting for definite instructions from defendant to proceed with the excavation of Paint Rock Canal. It is our opinion that the jury were authorized in finding, as it evidently did, that the defendant deliberately sought to procure a cancellation of the contract after the small canal was completed, and that failing in this, it endeavored by its correspondence and otherwise to create facts which might seem to militate against the legality of the claims made by the plaintiffs. The defendant retained and refused to pay, according to certain evidence, the 15% due upon the work that had already been completed, and this sum remains unpaid up to this time.

It is insisted on behalf of the defendant that the evidence heard at the trial is of such character as that the jury were not warranted in finding that the defendant had at any time definitely located the line for its Paint Rock Canal so as to permit the plaintiffs to proceed with the work thereon. If there is any merit at

subsequent to July 1, 1917, when the work on the main canal was completed, that the plaintiffs were ready to proceed with the work on the large canal. There is abundance of evidence in the record in support of the proposition of the plaintiffs that at all times since and before the completion of the small canal it stood ready to go on with the balance of the work provided for in the contract. The evidence shows that the plaintiffs and agents of the subcontractors, also employees, and, in-deed practically little from July 1st until October 1st, and it is unreasonable to suppose, under such circumstances, that plaintiffs were not sufficiently waiting for definite instructions from defendant to proceed with the construction of the last canal. It is our opinion that the jury were authorized in finding, as it evidently did, that the defendant deliberately sought to prevent a fulfillment of the contract after the small canal had completed, and that failing in this, it endeavored by its correspondence and discussions to create facts which might seem to mislead against the legality of the claims made by the plaintiffs. The defendant presents and relies on but, according to certain evidence, the 1st due from the work that had already been completed, and this was further urged on in this line.

It is insisted on behalf of the defendant that the evidence heard by the trial in of such character as that the jury were not warranted in finding that the defendant had at any time definitely issued the line for the point that should or ought the plaintiffs to proceed with the work thereon. If there is any merit in

all in this contention it is indicative of the refusal or failure of the defendant to use diligent and honest efforts to locate the route for the canal so that plaintiffs might proceed with the work required of them.

By reference to a drawing introduced in evidence may be seen three proposed routes for the Paint Rock Canal. The upper one of these routes is described as the High Line, the next below this route was called the Starrett Line, and the lowest of the three routes was described as the Low Line. The evidence tends to show that the High Line, which extends for a distance of about 52 miles, was, while the most expensive, the most practical line of the three; that the Starrett Line had been abandoned because of certain "gyp" formations that rendered it unfit to contain the waters to be drawn into the canal from a neighboring creek; and it was contended by the defendant that its engineer surveyed a route for the Low Line in August, 1909.

From a consideration of the whole evidence in the record, we think the jury was authorized to find that the defendant's attempt to establish the Low Line route was merely for the purpose of providing a plausible reason for its inexcusable delay in taking such prompt measures as would enable the plaintiffs to proceed with the work of excavating Paint Rock Canal.

It is insisted by defendant that errors were committed by the trial Judge in rulings upon the admissibility of evidence. We have considered these questions and we do not think that any error was committed with reference thereto which materially affected the course of the results of the trial. In admitting evidence as to the different kinds of material to be excavated on the High Line route for

the canal, the plaintiffs of necessity were compelled to rely upon the opinions of several expert witnesses who had gone over the route. This, together with the profile, map and other data in the possession of the plaintiffs, was apparently the best evidence obtainable on the subject.

Complaint is made of the action of the trial court in giving and refusing to give certain written instructions. Instruction 33 standing alone and without reference to other instructions given, might be regarded as defective. The instruction is long and the evident purpose was to deal with the measure of damages applicable to the fundamental facts on the plaintiffs' theory of the case, and it sought to inform the jury as to what anticipated profits, if any, the jury might consider in fixing the amount of plaintiffs' damages.

No reversible error was committed by the trial court in giving or refusing to give certain other instructions.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

the court, the liability of insanity were supplied to any upon the evidence of several expert witnesses who had gone over the ruins. This, together with the sanity, may and other data in the possession of the plaintiffs, can apparently the best evidence obtainable on the subject.

Implicit in each of the duties of the trial court is giving and refusing to give instructions relative to alternatives. Instruction to consider clear and relevant evidence to which instructions given, might be required as defective. The instruction is that the evidence tendered was to deal with the measure of damages rightness to the fundamental facts as the plaintiff's liability of the case, and it sought to inform the jury as to what particulars prevails. If so, the jury might consider it fixing the amount of plaintiffs' damages.

In particular later was considered by the trial court in giving or refusing to give certain alternative instructions.

The judgment of the Supreme Court is affirmed.

Judgment affirmed.

No brief

3508

317 - 23662

ELLA MEYER,
Appellee,

vs.

THE PROVIDERS LIFE ASSURANCE COMPANY, a corporation,
Appellant.

208 I.A. 223

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee has moved to dismiss this appeal for failure to file the appeal bond within the time first ordered by the court. The judgment was entered March 31, 1917. An appeal was granted on condition that the defendant file its appeal bond within twenty days therefrom. On April 24th the time for filing the appeal bond was extended ten days, and on the same day the bond was presented and approved by the court. It was held by the Supreme Court in Hill v. City of Chicago, 218 Ill. 178, that if the time designated in the order for filing the appeal bond has expired the jurisdiction of the court to approve the bond is lost. Appellant urges, however, that the Municipal Court, from whose judgment the appeal was taken, had jurisdiction to approve the bond any time within thirty days, the time within which that court can modify, alter or vacate a previous order. The same point was ineffectually urged in the Hill case, supra, the court holding that the jurisdiction over the order fixing the conditions of the appeal is retained only until the expiration of the time prescribed therein for filing the bond. Here, as there, the time for filing the bond expired without authorized extension, and the right of appeal was lost by failure to

THE MATTER,
Appellee,

vs.

THE PRESIDENT AND DIRECTORS
DEBORAH, a corporation,
Appellant.

APPEAL FROM
MERCIER COURT
OF ORLEANS.

MR. PRESIDING JUSTICE DUNNE
DELIVERED THE OPINION OF THE COURT:

Appellee has moved to dismiss this appeal for failure to file the record within the time fixed orders by the court. The judgment was entered March 21, 1971. An appeal was granted on condition that the defendant file its appeal bond within twenty days thereafter. On April 21st the time for filing the appeal bond was extended ten days, and on the same day the bond was promptly and approved by the court. It was held by the supreme Court in Bill v. City of Chicago, 319 Ill. 178, that if the time extension in the order for filing the appeal bond has expired the jurisdiction of the court to approve the bond is lost. Nevertheless, however, that the municipal court, from which judgment the appeal was taken, had jurisdiction to approve the bond one day less within thirty days, the time within which the court was entitled, after to vacate a previous order. The same point was in-effectually urged in the Bill case, supra. The court holding that the jurisdiction over the order fixing the conditions of the appeal is retained only until the expiration of the time prescribed herein for filing the bond. Here, in there, the time for filing the bond expired without authorized extension, and the right of appeal was lost by failure to

comply with the condition as to time imposed by statute.

There is no pretense that the facts of this case bring it within Section 95 of the Practice Act, which under certain conditions gives the court power to extend the time five days for filing a new bond.

APPEAL DISMISSED.

modifying the condition as to time imposed by statute.

There is no presumed that the lease of this case grant it within section 24 of the Statutes 1911, which under certain conditions give the court power to extend the time fixed date for filing a new lease.

[illegible]

39 - 22310

3370

208 I.A. 227

ISADOR FERGUSON,

Defendant in Error,

vs.

BERTHA STEINER,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

This writ of error was sued out to reverse a judgment in forcible detainer in favor of the defendant in error, who was the plaintiff below. The parties will be referred to as plaintiff and defendant.

The plaintiff was the owner of a certain ninety-nine-year leasehold, and entered into a contract with one Steiner, in which he agreed to transfer the leasehold, together with the buildings and improvements and Steiner agreed to purchase the same, for $20,000. The defendant, who was Steiner's assignee, had possession under this lease agreement from April 30, 1912, until January 24, 1916, when the writ of restitution was returned. It further appears that the defendant was continuously in arrears in her payments. On September 2, 1915, plaintiff served notice that the defaults in payments had continued for a longer period than thirty days, and that in consequence, the plaintiff declared the entire sum remaining due under the agreement to be due and payable, and that there was the sum of $6,557.58 due under the contract, as shown by the attached statement which was made a part of the notice, and that he

39 - 22216

ISAAC FRANKS K.,

Defendant in Error,

vs.

BERTHA STEINER,

Plaintiff in Error.

ERROR TO
SUPERIOR COURT
OF MILWAUKEE.

MR. PRESIDING JUSTICE GOCHER delivered the opinion of the court.

This writ of error was sued out to reverse a judgment in favor of the defendant in error, who was the plaintiff below. The parties will be referred to as plaintiff and defendant.

The plaintiff was the owner of a certain ninety-nine-year leasehold, and entered into a contract with one Steiner, in which he agreed to transfer the leasehold, together with the buildings and improvements and Steiner agreed to purchase the same, for $8,[illegible]. The defendant, who was Steiner's assignee, had possession under this lease agreement from April 30, 1912, until January 14, 1918, when the writ of restitution was returned. It further appears that the defendant was continuously in arrears in her payments. On September 2, 1915, plaintiff served notice that the default in payments had continued for a longer period than thirty days, and that in consequence, the plaintiff declared the entire sum remaining due under the agreement to be due and payable, and that there was the sum of $6,557.58 due under the contract, as shown by the attached statement which was made a part of the notice, and that no

demanded payment within three days from the service of the notice. Five days later another notice was served that on September 2, he declared the balance unpaid to be due and payable, and declared all payments theretofore made to be forfeited, and demanded immediate surrender of the premises under the contract.

Upon the trial the defendant offered to prove that about the 18th of August, 1913, and several times after said date, the plaintiff told defendant to remain in the place, pay him $400 a month instead of the amount provided in the contract, and that afterwards she paid the amount shown as cash credits on account, offered in evidence by the plaintiff, and that after August, 1915, plaintiff told defendant she could remain in the place, and pay him monthly an amount agreed to be paid or as much of it as she could, that he knew he would be able to dispose of the place for her, and that she could ultimately leave the place and make a profit of from $8,000 to $10,000 by selling the leasehold, and that plaintiff never tendered an assignment of the ground lease. So far as this offer of proof is concerned, it is a conclusive answer to any objection to the judgment based upon the exclusion of this evidence, that no assignment of error has been made on account of the admission or exclusion of evidence. It is also an answer to say that the offer was, in substance, to vary the terms of a written instrument, and substitute therefor an oral agreement of an entirely different character. The cases in which the court has laid down the rule that a lessor may estop himself by conduct from taking advantage of the provisions in regard to a forfeiture have no application here. Those cases do not go to the ex-

demanded payment within three days from the service of the notice. Five days later another notice was served that on September 8, he declared the balance unpaid to be due and payable, and declared all payments theretofore made to be forfeited, and demanded immediate surrender of the premises under the contract.

Upon the trial the defendant offered to prove that about the 13th of August, 1913, and several times after said date, the plaintiff told defendant to remain in the place, pay him $400 a month instead of the amount provided in the contract, and that afterwards she paid the amount shown as cash credits on account, offered in evidence by the plaintiff, and that after August, 1913, plaintiff told defendant she could remain in the place, and pay him monthly an amount agreed to be paid or as much of it as she could, that he knew he would be able to dispose of the place for her, and that she could ultimately leave the place and make a profit of from $8,000 to $10,000 by selling the leasehold, and that plaintiff never tendered an assignment of the ground lease. So far as this offer of proof is concerned, it is a conclusive answer to any objection to the judgment based upon the exclusion of this evidence, that no assignment of error has been made on account of the admission or exclusion of evidence. It is also an answer to say that the offer was, in substance, to vary the terms of a written instrument, and substitute therefor an oral agreement of an entirely different character. The cases in which the court has laid down the rule that a lessor may enjoy himself by conduct from taking advantage of the provisions in regard to a forfeiture have no application here. These cases do not go to the ex-

tent of saying that the written terms of the agreement can be changed by parol, as was here attempted, but merely that if the lessor, by his conduct, leads the leasee to believe that no advantage will be taken of the right of forfeiture, and the lessee is lulled into a sense of security by that conduct, an estoppel may arise. In the case at bar, however, the parties have expressly stipulated against any such inference. The contract itself provides that "Any previous extensions of time or delays in payment shall not be construed as a waiver of the right to so declare the entire sum due." Courts are not justified in saying that such extensions or delays shall have the effect of a waiver, and thus nullify the express agreement of the parties. We are, therefore, of the opinion that as this clause in the contract provided that extensions of time and delays in payment should not be constituted as a waiver of the right to declare the entire sum due, the action of the court in excluding evidence of such extensions of time and delays in payment was not erroneous. In addition to this, it may be said that even according to the defendant's own contention, the evidence offered would be totally insufficient to create an estoppel in any cause, either at law or in equity, since there is no evidence or offer of evidence in this record that defendant relied upon the alleged extensions and assurances, and placed herself in a different position from what she would otherwise have been in. An equitable estoppel could only rest upon proof that representations and promises were made to her, that she acted upon them, and that the grounds of forfeiture arose from the fact that she was thus lulled into a sense of security. The evidence is destitute of any such proof or offer of proof. A judgment cannot be reversed on account of the exclusion of

tent of saying that the written terms of the agreement can be changed by parol, as was here attempted, but merely that if the lessor, by his conduct, leads the lessee to believe that no advantage will be taken of the right of forfeiture, and the lessee is lulled into a sense of security by that conduct, an estoppel may arise. In the case at bar, however, the parties have expressly stipulated against any such inference. The contract itself provides that "any previous extensions of time or delays in payment shall not be construed as a waiver of the right to so declare the entire sum due." Courts are not justified in saying that such extensions or delays shall have the effect of a waiver, and thus nullify the express agreement of the parties. We are, therefore, of the opinion that as this clause in the contract provided that extensions of time and delays in payment should not be constituted as a waiver of the right to declare the entire sum due, the action of the court in excluding evidence of such extensions of time and delays in payment was not erroneous. In addition to this, it may be said that even assuming to the defendant's own contention, the evidence offered would be totally insufficient to create an estoppel in any cause, either at law or in equity, since there is no evidence or offer of evidence in this record that defendant relied upon the alleged extensions and assurances, and placed herself in a different position from what the rental otherwise have been in. An equitable estoppel could only rest upon proof that representations and promises were made to her, that she relied upon them, and that the grounds of forfeiture arose from the fact that she was thus lulled into a sense of security. The evidence is destitute of any such proof or offer of proof. A judgment cannot be reversed on account of the exclusion of

proper evidence unless the evidence offered, when considered in connection with the other evidence in the case, would have justified the jury in arriving at a contrary conclusion. In the absence of evidence of other necessary elements of equitable estoppel, the exclusion of the evidence offered could not be reversible error. It may be noted that plaintiff did not take advantage of defendant's default and terminate the contract without notice, but on the contrary, permitted five days to elapse between the time when he served notice that he had elected to declare the entire sum to be due and payable, and the time when he notified her that on account of her failure to make payments, he declared that contract forfeited. There is no evidence in the record upon which it would be possible to base a finding that defendant had not been given a reasonable time to make good her default, and this would, of course, be necessary to the establishment of an equitable estoppel. We expressly refrain from passing upon the contention that an equitable estoppel can in no case be pleaded in an action in forcible entry and detainer.

Counsel for defendant further claims that while plaintiff was given the right by contract to declare a forfeiture without notice, he has not pursued this method, but has undertaken to give notice, and that the notice given was for the payment of $6,557.58, when, as a matter of fact, there was more than $20,000 due. The first notice was to the effect that defendant was in arrears, and had been in arrears for rent more than thirty days, and that in consequence, the plaintiff declared the entire sum due, and further notified the defendant that there was $6,557.58 due him under the terms of the contract, as shown by the attached statement,

proper evidence unless the evidence offered, when considered in connection with the other evidence in the case, would have justified the jury in arriving at a contrary conclusion. In the absence of evidence of other necessary elements of equitable estoppel, the exclusion of the evidence offered could not be reversible error. It may be noted that plaintiff did not take advantage of defendant's default and terminate the contract without notice, but on the contrary, permitted five days to elapse between the time when he served notice that he had elected to declare the entire sum to be due and payable, and the time when he notified her that on account of her failure to make payments, he declared that contract forfeited. There is no evidence in the record upon which it would be possible to base a finding that defendant had not been given a reasonable time to make good her default, and this would, of course, be necessary to the establishment of an equitable estoppel. We expressly refrain from passing upon the contention that an equitable estoppel can in no case be pleaded in an action for feasible entry and detainer.

Counsel for defendant further claim that while plaintiff was given the right by contract to declare a forfeiture without notice, he was not pursued this method, but has undertaken to give notice, and that the notice given was for the payment of $6,387.88, when, as a matter of fact, there was more than $40,000 due. The first notice was to the effect that defendant was in arrears, and had been in arrears for rent more than thirty days, and that in consequence, the plaintiff declared the entire sum due, and further notified the defendant that there was $6,387.88 due him under the terms of the contract, as shown by the attached statement.

and that he demanded payment of this amount within three days; five days later, he served another notice calling attention to the fact that he had declared the entire balance due, and as she had made default in the payment of that amount, pursuant to the terms of the contract he declared it to be forfeited. We are of the opinion that under the terms of the contract plaintiff was entitled to declare the contract forfeited in the manner attempted by the second notice. In view of the language of the notice of September 2, 1915, declaring the entire purchase price due, and at the same time notifying the defendant to pay the sum of $6,557.58 within three days, it may be that the payment of the sum demanded within three days might have given rise to a question as to the right of the plaintiff to consider the entire sum due, but in the absence of any such payment, the right of the plaintiff to declare a forfeiture on September 7th, in the manner indicated, cannot be gainsaid.

For the reasons indicated, we are of the opinion that the points urged on behalf of the defendant are without merit, and that the judgment of the Municipal Court must be affirmed.

AFFIRMED.

and that he demanded payment of this amount within three days; five days later, he served another notice calling attention to the last time he had declared the entire balance due, and as she had made default in the payment of that amount, pursuant to the terms of the contract he declared it to be forfeited. We are of the opinion that under the terms of the contract plaintiff was entitled to declare the contract forfeited in the manner attempted by the second notice. In view of the language of the notice of September 2, 1913, declaring the entire purchase price due, and at the same time notifying the defendant to pay the sum of $6,837.50 within three days, it may be that the payment of the sum demanded within three days might have given rise to a question as to the right of the plaintiff to consider the entire sum due, but in the absence of any such payment, the right of the plaintiff to declare a forfeiture on September 7th, in the manner indicated, cannot be gainsaid.

For the reasons indicated, we are of the opinion that the points urged on behalf of the defendant are without merit, and that the judgment of the municipal court must be affirmed.

AFFIRMED.

146 - 23107

M. K. NORTHAM,

Appellee,

vs.

F. J. LEWIS MANUFACTURING COMPANY, a corporation,

Appellant.

208 I.A. 229

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to reverse a judgment against if for $480.00, in favor of the appellee. It appears that the appellee, who was a rolling stock broker, obtained a written contract from the appellant, a corporation, engaged in the manufacture of tank cars, whereby the latter authorized the former to lease twenty of its cars to the Sherman Cotton Oil Provision Co. for a period of six months at $26 per car per month, and agreed to pay him as a commission the amount for which they should be leased in excess of $26 per car per month. He procured a contract with the Sherman Company by which they agreed to lease the cars at $30 per month. The contract was, however, not carried out, and there is a conflict in the evidence as to which party was at fault. We are of the opinion, however, that the contract between appellee and appellant was for the payment to appellant of a certain amount for securing a contract for the leasing of the cars. If the contract between appellant and the lessor was not carried out on account of the lessee's default, then appellant had a right to a recovery of its entire damages, based upon the rate

M. K. WORTHAM,

Appellee,

vs.

T. J. LEWIS MANUFACTURING COMPANY, a corporation,

Appellant.

APPEAL FROM DALLAS COUNTY COURT.

DOCK NUMBER 229

MR. PRESIDING JUSTICE SCOTTON delivered the opinion of the court.

Appellant seeks to reverse a judgment against it for $450.00, in favor of the appellee. It appears that the appellee, who was a selling stock broker, obtained a written contract from the appellant, a corporation, engaged in the manufacture of tank cars, whereby the latter authorized the former to lease twenty of its cars to the Sherman Cotton Oil Provision Co. for a period of six months at $30 per car per month, and agreed to pay him as a commission the amount for which they should be leased in excess of $30 per car per month. He procured a contract with the Sherman Company by which they agreed to lease the cars at $30 per month. The contract was, however, not carried out, and there is a conflict in the evidence as to which party was at fault. We are of the opinion, however, that the contract between appellee and appellant was for the payment to appellant of a certain amount for renting a contract for the leasing of the cars. If the contract between appellant and the lessor was not carried out on account of the lessee's default, then appellant had a right to a recovery of its entire damages, based upon the rate

of $30 per month per car, which included the appellee's commission. On the other hand, if appellant was itself in default, it could not complain. In any event, the commissions were, in our opinion, earned when the cars were leased, and appellee became entitled to be compensated in accordance with the terms of his contract with appellant. We think there is nothing in the suggestion that the entry of the judgment was erroneous because suit was brought under the common counts; it was brought for services rendered; there was an affidavit of merits disclosing the nature of the claim, and a plea of non-assumpsit in the affidavit of merits. No objection was made to the introduction of the evidence. In these circumstances, the declaration was clearly sufficient to support the judgment. (Springer v. Orr, 82 Ill. App. 568.)

The judgment of the County Court is affirmed.

AFFIRMED.

of 150 per month per car, which included the appellee's commission. On the other hand, if appellant was itself in default, it could not complain. In any event, the commissions were, in our opinion, earned when the cars were leased, and appellee became entitled to be compensated in accordance with the terms of his contract with appellant. We think there is nothing in the suggestion that the entry of the judgment was erroneous because suit was brought under the common counts; it was brought for services rendered; there was an affidavit of merits disclosing the nature of the claim, and a plea of non-assumpsit in the affidavit of merits. No objection was made to the introduction of the evidence. In these circumstances, the declaration was clearly sufficient to support the judgment. (Springer v. Carr, 22 Ill. App. 562.)

The judgment of the municipal Court is affirmed.

AFFIRMED.

175 - 23140

GEORGE KHRAT, trading as GEORGE KHRAT & COMPANY,
Appellee,

vs.

V. MARRONE and R. LOFARO, trading as MARRONE & LOFARO,
Appellants.

208 I.A. 230

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

Appellants seek to reverse a decree restraining them from enforcing a claim against the appellee upon which suit had been begun in the Municipal Court, in which it had been properly held that appellee's claim of set off could not be entertained because it was for unliquidated damages growing out of another transaction. Appellee then filed his bill of complaint which, in its amended form, recited the history of the suit in the Municipal Court, alleged that he had a claim against appellants for unliquidated damages growing out of a shipment of macaroni which had been damaged in transit, and that he had received and paid for it in ignorance of the fact that his instructions to take out the insurance in his name had been disregarded by appellants. It further stated that the appellants, who constituted a non-resident partnership, and who resided in the State of New York, had dissolved their partnership and had ceased doing business, and that they now resided in different jurisdictions, and were insolvent, and that in view of these facts it would be impossible to collect a judgment from the firm; that the amount due him for damages was in excess of

178 - 52140

GEORGE KEHAT, trading as
GEORGE KEHAT & COMPANY,
Appellee,

vs.

V. MARNONE and R. LOVARO,
trading as MARNONE & LOVARO,
Appellants.

208 I.A. 230

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

Appellants seek to reverse a decree restraining them from enforcing a claim against the appellee upon which suit had been begun in the Municipal Court, in which it had been properly held that appellee's claim of set off could not be entertained because it was for unliquidated damages growing out of another transaction. Appellee then filed his bill of complaint which, in its amended form, recited the history of the suit in the Municipal Court, alleged that he had a claim against appellants for unliquidated damages growing out of a shipment of macaroni which had been damaged in transit, and that he had received and paid for it in ignorance of the fact that his instructions to take out the insurance in his name had been disregarded by appellants. It further stated that the appellants, who constituted a non-resident partnership, and who resided in the State of New York, had dissolved their partnership and had ceased doing business, and that they now resided in different jurisdictions, and were insolvent, and that in view of these facts it would be impossible to collect a judgment from the firm; that the amount due him for damages was in excess of

the amount of the claim which said appellants were attempting to enforce against him in the Municipal Court, and prayed that an account be taken, and that appellee be allowed an equitable set-off. The court entered a decree finding that all the material allegations in appellee's bill of complaint as amended were true, and enjoined appellants from enforcing their claim.

Appellants contend that by accepting the shipment appellee waived all claim for damages except for fraud or latent defects incapable of discovery. We think it a complete answer to this to say that the goods were received in ignorance of the fact that appellants had violated their shipping instructions, and thatin consequence, appellee was not protected by insurance or otherwise against the loss resulting from damage in transit. We think it also an equally conclusive answer to say that in shipments of the kind in question, there is an implied warranty that the goods shall be merchantable, and the master expressly found in this case that the goods were received in a damaged condition, unfit for sale. Our Supreme Court has repeatedly held that where there is an express or implied warranty of quality, the purchaser may receive the goods and recover the damages resulting from a breach of that warranty. (Wolf Co. v. Refrigerator Co., 252 Ill. 491, at page 508.) In the present case it is clear, therefore, that appellee did not, by recieving the goods, waive his right to recover on account of their damaged condition. We are of the opinion that the case disclosed proper grounds for the equitable relief granted in the decree.

The decree of the Circuit Court if affirmed.

AFFIRMED.

the amount of the claim which said appellants were attempting to enforce against him in the Municipal Court, and prayed that an account be taken, and that appellee be allowed an equitable set-off. The court entered a decree finding that all the material allegations in appellee's bill of complaint as amended were true, and enjoined appellants from enforcing their claim.

Appellants contend that by accepting the shipment appellee waived all claim for damages except for fraud or latent defects incapable of discovery. We think it a complete answer to this to say that the goods were received in ignorance of the fact that appellants had violated their shipping instructions, and that in consequence, appellee was not protected by insurance or otherwise against the loss resulting from damage in transit. We think it also an equally conclusive answer to say that in shipments of the kind in question, there is an implied warranty that the goods shall be merchantable, and the master expressly found in this case that the goods were received in a damaged condition, unfit for sale. Our Supreme Court has repeatedly held that where there is an express or implied warranty of quality, the purchaser may receive the goods and recover the damage resulting from a breach of that warranty. (Kill v. Refrigerator Co., 234 Ill. 491, at page 506.) In the present case it is clear, therefore, that appellee did not, by receiving the goods, waive his right to recover on account of their damaged condition. We are of the opinion that the bill disclosed proper grounds for the equitable relief granted in the decree.

The decree of the Circuit Court is affirmed.

AFFIRMED.

203 - 23169

GREEK-AMERICAN SPONGE CO.,
a corporation,
Appellee,

vs.

B. VAN BUREN,
Appellant.

208 I.A. 254

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to reverse a judgment against him in favor of appellee for $369.89, for certain sponges alleged to have been sold and delivered to appellant at 2802 Madison street, Chicago, upon his agreement to pay for them.

There is a direct conflict in the evidence, but it sufficiently appears from appellant's own testimony that he had been doing business at the place where the sponges were delivered for some ten years; that he owned the property there; that at one time he sold the business to one O'Niell, and then bought it back; that about five years before the goods in question were delivered he incorporated the business, sold it, and took it back. He further testified that in November, 1913, Charles F. Mann was president and secretary of the corporation, and that in that month he went with Mann to the agent of the appellee and said that Mann was the proprietor of the business, and that he (appellant) had nothing more to do with it; that after this it appears that the paint bill was rendered to the Van Buren Paint and Hardware Store and that afterwards bills

208 - 23169

GREEN-AMERICAN PAINT CO., a corporation, Appellee, vs. B. VAN BUREN, Appellant.	208 I.A. 254 APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE GREEN delivered the opinion of the court.

Appellant seeks to reverse a judgment against him in favor of appellee for $369.39, for certain sponges alleged to have been sold and delivered to appellant at 2802 Madison street, Chicago, upon his agreement to pay for them.

There is a direct conflict in the evidence, but it sufficiently appears from appellant's own testimony that he had been doing business at the place where the sponges were delivered for some ten years; that he owned the property there; that at one time he sold the business to one O'Neil, and then bought it back; that about five years before the goods in question were delivered he incorporated the business, sold it, and took it back. He further testified that in November, 1913, Charles F. Mann was president and secretary of the corporation, and that in that month he went with Mann to the agent of the appellee and said that Mann was the proprietor of the business,and that he (appellant) had nothing more to do with it; that after this it appears that the paint bill was rendered to the Van Buren Paint and Hardware Store and that afterwards bills

were rendered to the Van Buren Paint and Hardware Co.

On behalf of the appellee, however, the testimony is to the effect that appellant came to them in November, 1913, and said that he had two boys who were running the store for him; that he wanted them to have the best goods, and that appellee need not be afraid, as he would pay all bills.

There is, therefore, a decided conflict in the evidence as to whether the goods in question were sold to the appellant on his own credit or to the company. Upon an examination of the entire record, however, we do not feel warranted in holding that the verdict in favor of appellee was contrary to the manifest weight of the evidence.

It is insisted that the court erred in refusing to admit in evidence a certified copy of a certificate of the increase in the capital stock of the company. We do not think the evidence offered tended to prove any issue in dispute; there had already been admitted in evidence the original certificate of incorporation, and subsequently the court admitted a bill of sale from the appellee to the corporation. No question was raised or could be raised as to the fact that the Van Buren Paint & Hardware Company was duly incorporated, and that Mann, who went with appellant to appellee's place of business, was president of the company and was actually conducting the business. The only matter in controversy was as to whether or not credit was extended to Van Buren or to the company.

were tendered to the Van Buren Paint and Hardware Co.

On behalf of the appellee, however, the testimony in to the effect that appellant came to them in November, 1913, and said that he had two boys who were running the store for him; that he wanted them to have the best goods, and that appellee need not be afraid, as he would pay all bills.

There is, therefore, a decided conflict in the evidence as to whether the goods in question were sold to the appellant on his own credit or to the company. Upon an examination of the entire record, however, we do not feel warranted in holding that the verdict in favor of appellee was contrary to the manifest weight of the evidence.

It is insisted that the court erred in refusing to admit in evidence a certified copy of a certificate of the increase in the capital stock of the company. We do not think the evidence offered tended to prove any issue in dispute; there had already been admitted in evidence the original certificate of incorporation, and subsequently the court admitted a bill of sale from the appellee to the corporation. No question was raised or could be raised as to the fact that the Van Buren Paint & Hardware Company was duly incorporated, and that Kane, who went with appellant to appellee's place of business, was president of the company and was actually conducting the business. The only matter in controversy was as to whether or not credit was extended to Van Buren or to the company.

As we are unable to say that the verdict was contrary to the manifest weight of the evidence, and there appears to be no reversible error in the rulings of the court, the judgment of the Municipal Court is affirmed.

AFFIRMED.

As we are unable to say that the verdict was contrary to the manifest weight of the evidence, and there appears to be no reversible error in the rulings of the court, the judgment of the Municipal Court is affirmed.

AFFIRMED.

210 - 23176

208 I.A. 255

MORAND BROTHERS, (a corp.)
Appellee,

vs.

CLYDE R. BATES, doing business as the Blackstone Buffet,
Appellant.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to reverse a judgment against him for $56.42, for liquors sold and delivered to the Blackstone Buffet. No brief has been filed on behalf of appellee.

From the statement of facts signed by the trial judge, it appears that appellant was the owner of the property, and had been the owner of the property, and had been the owner and proprietor of the saloon, but over a year before the goods were sold, he leased it to one Tiernan, who operated it under the licenses of appellant, who made no representations to anyone that he was the owner. The liquor in question was sold on the 15th of April, 1916, and in the following August, appellant took back the premises from Tiernan, who was greatly in arrears for rent. It had been the custom of defendant to inspect the cash register each night, and count the money, which was deposited to the credit of Blackstone Buffet, P. J. Tiernan. No one but Tiernan was authorized to sign checks. In August, before the lease was terminated, appellant, with his tenant's consent, took the

216 - 23176

208 I.A. 255

JOSEPH BRENNAN, (a corp.)

Appellee,

vs.

OLIVER H. PATTY, doing business as the Blackstone Buffet,

Appellant.

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Appellant seeks to reverse a judgment against him for $20.42, for liquors sold and delivered to the Blackstone Buffet. No brief has been filed on behalf of appellee.

From the statement of facts signed by the trial judge, it appears that appellant was the owner of the property, and has been the owner of the property, and had been the owner and proprietor of the saloon, but over a year before the goods were sold, he leased it to one Tierman, who operated it under the license of appellant, who made no representations to anyone that he was the owner. The liquor in question was sold on the 17th of April, 1918, and it the following August, appellant took back the premises from Tierman, who was greatly in arrears for rent. It had been the custom of defendant to inspect the cash register each night, and after the money, which was deposited in the cash of Blackstone Buffet, i. e. Tierman. In one but Tierman was authorized to sign checks. In August, before the lease was terminated, appellant, with his tenant's consent, took the

contents of the cash register and deposited the money in his own name; there were no profits earned.

We are impressed with the argument made in support of the contention that these facts did not justify an inference that appellant was the proprietor of the saloon, or that the goods were purchased on his account, and in the absence of any suggestion to the contrary, the contention is sustained.

The judgment of the Municipal Court is reversed.

REVERSED.

contents of the cask registrar and appellee the money in his own name; there was no profits earned.

We are interested with the argument made in support of the contention that these facts all not justify an inference that appellant was the proprietor of the saloon, or that the goods were purchased on his account, and in the absence of any suggestion to the contrary, the contention is sustained.

The judgment of the municipal court is reversed.

REVERSED.

217 - 23183

JOHN B. JOSLYN,
Appellee,

vs.

MARTHA S. SIMMONS,
Appellant.

208 I.A. 256

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to reverse an attachment judgment against her for $40.30. An affidavit for attachment was filed, setting up that there was due appellee $40.30 for wages as janitor. An attachment bond was filed, a writ of attachment issued, and afterwards appellant entered her special appearance for the sole purpose of moving to quash the writ of attachment. This motion was overruled, and leave was given to file an amended affidavit for attachment within six days. Afterwards, the plaintiff filed "his amended affidavit of claim," in which he set up in detail the grounds of his claim for wages. Appellant afterwards obtained leave to have her special appearance "stand to plaintiff's amended statement of claim." Appellant thereafter entered a new motion to quash the writ, which was overruled. Judgment was entered in the attachment proceedings and against the garnishees. No brief has been filed on behalf of appellee.

Appellant's contention is, in brief, that by filing the so-called affidavit of claim, appellee abandoned his former affidavit, and that the judgment is void because

21V - 2N135

JOHN H. JEFFRIN,

Appellee,

vs.

MARTHA S. SIMKINS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

208 I.A. 256

MR. PRESIDING JUSTICE GOODRICH delivered the opinion of the court.

Appellant seeks to reverse an attachment judgment against her for $42.50. An affidavit for attachment was filed, setting up that there was due appellee $42.50 for wages as janitor. An attachment bond was filed, a writ of attachment issued, and afterwards appellant entered her special appearance for the sole purpose of moving to quash the writ of attachment. This motion was overruled, and leave was given to file an amended affidavit for attachment within six days. Afterwards, the plaintiff filed "his amended affidavit of claim," in which he set up in detail the grounds of his claim for wages. Appellant afterwards obtained leave to have her special appearance "stand to plaintiff's amended statement of claim." Appellant thereafter entered a new motion to quash the writ, which was overruled. Judgment was entered in the attachment proceeding and against the garnishee. No brief has been filed on behalf of appellee.

Appellant's contention is, in brief, that by filing the so-called affidavit of claim, appellee abandoned his former affidavit, and that the judgment is void because

the amended affidavit showed no ground of attachment, and was not accompanied by a new bond. It clearly appears, however, that while appellee was given leave to file an amended affidavit for attachment, no such affidavit was, in fact, filed. The amended affidavit filed was in substance and in form, as well as specifically stated to be, an affidavit of claim, and as such would have been a proper basis for a personal judgment, if appellant appeared or can be said to have appeared generally. The record, therefore, presents a case in which a proper affidavit for attachment has been made, a statutory bond filed, due notice given, and a judgment properly entered. We are of the opinion that the validity of the judgment is in no way affected by the filing of the affidavit of claim.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

the amended affidavit showed no ground of attachment, and was not accompanied by a new bond. It clearly appears, however, that while appellee was given leave to file an amended affidavit for attachment, no such affidavit was, in fact, filed. The amended affidavit filed was in substance and in form, as well as specifically stated to be, an affidavit of claim, and as such would have been a proper basis for a personal judgment, if appellant appeared or can be said to have appeared generally. The record, therefore, presents a case in which a proper affidavit for attachment has been made, a statutory bond filed, due notice given, and a judgment properly entered. We are of the opinion that the validity of the judgment is in no way affected by the filing of the affidavit of claim.

The judgment of the municipal court is affirmed.

AFFIRMED.

158 - 23122

208 I.A. 257

JOSEPH LESCZAUSKIS,
Appellee,

vs.

WILLIAM DOWNS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Joseph Lesczauskis brought suit in the Municipal Court of Chicago against William Downs claiming $2,844.34. There was a trial before the court and jury and a verdict and judgment in favor of plaintiff for $2,234.34, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff was the owner of a piece of real estate on which he desired to have a building constructed, and for that purpose entered into a written contract with one Freikschat. To secure the faithful performance of the contract a bond was entered into upon which defendant and another were sureties. The contractor proceeded with the construction of the building, but failed to complete it, and thereupon plaintiff at his own expense completed the building and brought suit against the contractor and the two sureties for the amount he had expended in excess of the contract price. That suit was begun January 8, 1914, in the Municipal Court. The two sureties were served but the contractor was not. The defendant filed an affidavit

JOSEPH LYNCH, ESQ.,

Appellee.

APPEAL FROM

vs.

MUNICIPAL COURT

OF CHICAGO.

WILLIAM DOWNS,

Appellant.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Joseph Lynch brought suit in the municipal court of Chicago against William Downs claiming $3,844.34. There was a trial before the court and jury and a verdict and judgment in favor of plaintiff for $3,234.34, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff was the owner of a piece of real estate on which he desired to have a building constructed, and for that purpose entered into a written contract with one Freiberger. To secure the faithful performance of the contract a bond was entered into upon which defendant and another were sureties. The contractor proceeded with the construction of the building, but failed to complete it, and thereupon plaintiff at his own expense completed the building and brought suit against the contractor and the two sureties for the amount he had expended in excess of the contract price. That suit was begun January 8, 1914, in the municipal court. The two sureties were served but the contractor was not. The defendant filed an affidavit

of merits February 16, 1914, and the other surety a few weeks prior thereto. The case was continued from time to time, and on September 23, 1914, on motion of plaintiff the suit was dismissed as to the two sureties. Two days afterwards, September 25th, an alias summons was issued and on the next day served on the contractor, and on October 14th following, no appearance having been filed, the contractor was defaulted, and on the 19th of October, damages were assessed against him and judgment entered for $2,234.34. Afterwards on November 23, 1914, plaintiff brought the instant case against the defendant. The statement of claim set up the building contract, the bond executed by the defendant as one of the sureties, and the proceedings resulting in a verdict and judgment against the building contractor in the prior suit. The defendant filed an affidavit of merits setting up that the building contractor did not fail in the performance of his contract but that the plaintiff released him, and completed the building himself; that the bond had been altered subsequent to its execution by him, in that the name of the other surety had been stricken out without notice to or knowledge of the defendant; that the plaintiff was not damaged, and denying any liability.

On the trial plaintiff offered evidence tending to show the amount he necessarily expended in the completion of the building. Some of the items were admitted in evidence and others, on objection which did not go to the merits of the items, were excluded, so that plaintiff was unable to prove the damages claimed. He then introduced in evidence the judgment which he had secured against the contractor, which was for the same amount as the judgment in this case. When this judgment was offered its admission was

of March February 16, 1914, and the other nearly a few weeks prior thereto. The case was continued from time to time, and on September 22, 1914, on motion of plaintiff the suit was dismissed as to the two surveys. The day afterwards, September 23th, an alias summons was issued and on the next day served on the mayor, and on October 14th following, no appearance having been filed, the contractor was defaulted, and on the 19th of October, damages were assessed against him and judgment entered for $2,324.24. Afterwards on November 22, 1914, plaintiff brought the instant case against the defendant. The statement of claim set up the building contract, the bond executed by the defendant as one of the sureties, and the proceedings resulting in a verdict and judgment against the building contractor in the prior suit. The defendant filed an affidavit of merits setting up that the building contractor did not fail in the performance of his contract but that the plaintiff released him, and completed the building himself; that the bond had been altered subsequent to its execution by him, in that the name of the other surety had been stricken out without notice to or knowledge of the defendant; that the plaintiff was not damaged, and denying any liability.

In the trial plaintiff offered evidence tending to show the amount he necessarily expended in the completion of the building. Some of the items were admitted in evidence and others, on objection which did not go to the merits of the items, were excluded, so that plaintiff was unable to prove the damages claimed. He then introduced in evidence the judgment which he had recovered against the contractor, which was for the same amount as the judgment in this case. When this judgment was offered its admission was

objected to by defendant, for the reason that the judgment was against the contractor only; that it appeared that the two sureties in the case in which the judgment was rendered had been made defendants and had filed their affidavits of merits; that afterwards on motion of the plaintiff the suit was dismissed as to them; that at that time no summons had been served on the contractor, and that there was no suit pending, and defendant was therefore not bound by the judgment. In this court defendant argues that the manner in which the sureties were dismissed out of the first suit and judgment obtained against the contractor has the appearance of collusion and was fraudulent against the defendant; that at best the introduction of this judgment was only prima facie evidence against the defendant and that since plaintiff by his other evidence failed to prove the specific items in his endeavor to prove the amount of his damages, the prima facie case made out was overcome and destroyed. There was no contention made by the defendant in his affidavit of merits that there was any fraud or collusion in obtaining the judgment against the contractor, nor was that contention made in the trial court; and, while the circumstances might arouse suspicion in some cases, there is no contention made that the various items or expense which plaintiff claimed to have expended in the completion of the building were not correct nor that the amount of the judgment which was made up of these items was incorrect. In these circumstances the judgment was properly admitted, and was prima facie evidence of the amount due. Henry v. Heldmaier, 226 Ill. 152. This proof, of course, might be overcome by the defendant's introducing evidence that there was collusion or that the amount for any reason was incorrect.

objected to by defendant, for the reason that the judgment was against the contractor only; that it appeared that the two sureties in the case in which the judgment was rendered had been made defendants and had filed their affidavits of merits; that afterwards on motion of the plaintiff the suit was dismissed as to them; that at that time no summons had been served on the contractor, and that there was no suit pending, and defendant was therefore not bound by the judgment. In this court defendant argues that the manner in which the sureties were dismissed out of the first suit and judgment obtained against the contractor has the appearance of collusion and was fraudulent against the defendant; that at best the introduction of this judgment was only prima facie evidence against the defendant and that since plaintiff by his other evidence failed to prove the specific items in his endeavor to prove the amount of his damages, the prima facie case made out was overcome and destroyed. There was no contention made by the defendant in his affidavit of merits that there was any fraud or collusion in obtaining the judgment against the contractor, nor was that contention made in the trial court; and, while the circumstances might arouse suspicion in some cases, there is no contention made that the various items or expense which plaintiff claimed to have expended in the completion of the building were not correct nor that the amount of the judgment which was made up of these items was incorrect. In these circumstances the judgment was properly admitted, and was prima facie evidence of the amount due. Henry v. Reidmaier, 226 Ill. 152. This proof, of course, might be overcome by the defendant's introducing evidence that there was collusion or that the amount for any reason was incorrect.

We also are of the opinion that the other proof offered by plaintiff to establish the several items did not overcome the prima facie case as made by the judgment, for the reason that the evidence of none of the items was excluded on the ground that the expense had been improperly incurred, but on the ground that plaintiff should have shown that the amount of the items was the usual, customary and reasonable amounts for the work done.

The defendant also contends that there was an alteration in the bond after its execution by him, which rendered it invalid and unenforcible,-- that the name of the other surety was stricken from the bond after it was executed by defendant without any knowledge or notice to him and that this position is sustained by a preponderance of the evidence. The evidence on behalf of the plaintiff tends to show that the alteration was made before the bond was signed by the defendant. On the other side, the evidence tends toshow that the alteration was made afterwards. Plaintiff further introduced evidence tending to show that after the alteration he demanded another surety and the bond in its altered condition was submitted to the defendant who then stated that he (defendant) was of sufficient financial ability alone on the bond. The court instructed the jury on these several contentions and no complaint is made of the instructions. The jury found in favor of the plaintiff, and its finding was approved by the trial judge, and we think that the verdict and judgment are sustained by the evidence.

Another complaint is made that the judgment offered

We also are of the opinion that the other proof offered by plaintiff to establish the several items did not overcome the prima facie case as made by the judgment, for the reason that the evidence of most of the items was excluded on the ground that the expenses had been improperly incurred, but on the ground that plaintiff should have shown that the amount of the items was the usual, customary and reasonable amounts for the work done.

The defendants also contend that there was an alteration in the bond after its execution by him, which rendered it invalid and unenforceable,-- that the name of the other surety was stricken from the bond after it was executed by defendant without any knowledge or notice to him and that this position is sustained by a preponderance of the evidence. The witness on behalf of the plaintiff tends to show that the alteration was made before the bond was signed by the defendant. On the other side, the evidence tends to show that the alteration was made afterwards. Plaintiff further introduced evidence tending to show that after the alteration by demanding another surety and the bond in its altered condition was submitted to the defendant who then stated that he (defendant) was of sufficient financial ability alone on the bond. The court instructed the jury on these several contentions and no complaint is made of the instruction. The jury found in favor of the plaintiff, and its finding was approved by the trial judge, and we think that the verdict and judgment are sustained by the evidence.

Another complaint is made that the judgment offered

in evidence was entered in an assumpsit suit, and that it was inadmissible in an action of debt on the bond as in the instant case. The point is without merit.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

in evidence was entered in an unemployment suit, and that it was chargeable in an action of debt on the bond as in the instant case. The point is without merit.

The judgment of the municipal court of Tulsa is affirmed.

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162 - 23126

208 I.A. 258

THE NORTHERN TRUST COMPANY, as Trustee of the Estate of Joseph W. Wassall, Deceased,

Appellee,

vs.

SIDNEY J. KNOWLES,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal appellant seeks to reverse a judgment of the Circuit Court of Cook County against him for $1022.67.

The record discloses that appellee was appointed executor and trustee of the last will of Joseph W. Wassall, deceased, and on the 4th day of October, 1909, entered into two contracts with appellant. The first was by appellee as administrator and covered a period of one year, and the second was by appellee as trustee and covered a period of four years, immediately following the expiration of the first contract.

Joseph W. Wassall, in his lifetime was a practicing dentist in Chicago, and appellee, also a dentist, was in his employ. By the first contract appellant was to have the use and benefit of the leasehold, offices and good will of the deceased's business for a period of one year, and in consideration therefor agreed to pay "from time to time as same shall be received, one-quarter of the total gross

THE NORTHERN TRUST COMPANY, as Trustee of the Estate of Joseph W. Wassall, Deceased,

Appellee,

vs.

SIDNEY J. KOCHEES,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal appellant seeks to reverse a judgment of the Circuit Court of Cook County against him for $10[illegible].67.

The record discloses that appellee was appointed executor and trustee of the last will of Joseph W. Wassall, deceased, and on the 4th day of October, 1905, entered into two contracts with appellant. The first was by appellee as administrator and covered a period of one year, and the second was by appellee as trustee and covered a period of four years, immediately following the expiration of the first contract.

Joseph W. Wassall, in his lifetime was a practicing dentist in Chicago, and appellee, also a dentist, was in his employ. By the first contract appellant was to have the use and benefit of the leasehold, offices and good will of the deceased's business for a period of one year, and in consideration therefor agreed to pay "from time to time as same shall be received, one-quarter of the total gross

receipts received by him from his professional practice for a period" of one year. By the second contract appellee sold to appellant the good will, leasehold, rights, office fixtures, furniture, and instruments pertaining to the professional practice of the deceased, for which appellant agreed to pay "from time to time as same shall be received, one-quarter of the total receipts received by him from his professional practice for a period beginning on the 4th day of October, 1910, and ending on the 4th day of October, 1914." Upon the execution of the first contract appellant took possession of the offices of the deceased and proceeded to carry on the professional business and from time to time made payments to appellee in accordance with the provisions of the contract. When the period covered by the second contract expired, October 4, 1914, there was due and owing to appellant for work done prior to that date, $12,436.96, and after October 4, 1914, and prior to the beginning of this suit, appellant collected $4,590.07 of the amount so due and owing him. To recover twenty-five per cent of this amount appellee brought this suit. At the close of all the evidence the court instructed the jury to find for appellee.

The principal controversy between the parties was the construction of the second contract (the first contract is not involved), appellant contending that he was not liable for any moneys collected by him after October 4, 1914, although the services had been performed prior to that time and during the period covered by the second contract. In support of this it is argued that this interpretation is in accordance with the contract itself, and furthermore that this is the construction placed upon the contract by the parties themselves, as shown by the monthly letters enclosing

receipts received by him from his professional practice for a period" of one year. By the second contract appellee sold to appellant the good will, leasehold, rights, office fixtures, furniture, and instruments pertaining to the professional practice of the deceased, for which appellant agreed to pay "from time to time as same shall be received, one-quarter of the total receipts received by him from his professional practice for a period beginning on the 4th day of October, 1910, and ending on the 4th day of October, 1914."

Upon the execution of the first contract appellant took possession of the offices of the deceased and proceeded to carry on the professional business and from time to time made payments to appellee in accordance with the provisions of the contract. When the period covered by the second contract expired, October 4, 1914, there was due and owing to appellant for work done prior to that date, $12,456.96, and after October 4, 1914, and prior to the beginning of this suit, appellant collected $4,590.07 of the amount so due and owing him. To recover twenty-five per cent of this amount appellee brought this suit. At the close of all the evidence the court instructed the jury to find for appellee.

The principal controversy between the parties was the construction of the second contract (the first contract is not involved), appellant contending that he was not liable for any moneys collected by him after October 4, 1914, although the services had been performed prior to that time and during the period covered by the second contract. In support of this it is argued that this interpretation is in accordance with the contract itself, and furthermore that this is the construction placed upon the contract by the parties themselves, as shown by the monthly letters enclosing

remittances from appellant to appellee. With this contention we do not agree. We think it clear that it was the intention of the parties, as expressed by the contract, that appellee was to receive from appellant twenty-five per cent of the gross fees earned during the four years period covered by the second contract, whether the collections were made during that period or afterwards. Any other construction would be manifestly unreasonable. Moreover this same construction was placed upon the first contract by the parties, which contained the same provisions as the second. At the expiration of the year covered by the first contract there was $7,145 uncollected bills. A part of this was subsequently collected and appellant paid appellee its twenty-five per cent of the amount collected. This was testified to by appellant himself.

Complaint is also made that the evidence is insufficient to sustain the verdict and judgment. During the examination of appellant, who was called as a witness for appellee, he testified that since the expiration of the contract and prior to the beginning of the suit, he collected for services rendered prior to the expiration of the contract $4,590.07. On cross-examination he testified that a part of this was made up of fees earned by him during the period covered by the first contract, and that he could not give the exact amount without taking some time in going over the books. The court would not permit any delay. On re-direct the witness stated he would not say that the amount of fees collected by him for the first period and included in the $4,590.07 was more than $100; that he could not tell, but if they wanted him to guess, he would say $500. The court

remittances from appellant to appellee. With this contention we do not agree. We think it clear that it was the intention of the parties, as expressed by the contract, that appellee was to receive from appellant twenty-five per cent of the gross fees earned during the four years period covered by the second contract, whether the collections were made during that period or afterwards. Any other construction would be manifestly unreasonable. Moreover this same construction was placed upon the first contract by the parties, which contained the same provisions as the second. At the expiration of the year covered by the first contract there was $7,145 uncollected bills. A part of this was subsequently collected and appellant paid appellee its twenty-five per cent of the amount collected. This was testified to by appellant himself.

Complaint is also made that the evidence is insufficient to sustain the verdict and judgment. During the examination of appellant, who was called as a witness for appellee, he testified that since the expiration of the contract and prior to the beginning of the suit, he collected for services rendered prior to the expiration of the contract $4,390.07. On cross-examination he testified that a part of this was made up of fees earned by him during the period covered by the first contract, and that he could not give the exact amount without taking some time in going over the books. The court would not permit any delay. On re-direct the witness stated he would not say that the amount of fees collected by him for the first period and included in the $4,390.07 was more than $150; that he could not tell, but if they wanted him to guess, he would say $300. The court

said he would consider the answer of the witness to be $500 and this amount was deducted from the $4,590.07, and a directed verdict returned for twenty-five per cent of the remainder. Appellant argues from this that no specific amount can be arrived at, and therefore the court should have instructed the jury to find for the defendant. The testimony of appellant was at least some evidence of the amount, and we think, where the court allowed the maxium amount in appellant's favor, he is not in a position to complain.

Appellant further contends that there was an accord and satisfaction; that this is shown in every monthly remittance made by appellant covering the entire period of time, wherein he stated in enclosing his check that the same was in full for the month mentioned; that about the expiration of the time covered by the second contract, a dispute arose as to the meaning of the contract, both parties then taking the same position that they now take; that shortly afterwards there was correspondence between them and their respective attorneys as to the true meaning of the contract; that several months afterwards, March 4, 1915, appellant made his last payment, and in his letter of that date, stated that the payment was "for the month of September and October, 1914, the balance due from me, to you as trustee of Dr. W. J. Wassall's Estate;" that afterwards, April 26, 1915, appellee executed and delivered to appellant its bill of sale in accordance with the contract, wherein it acknowledged receipt of the consideration provided for in the contract, and from this appellant contends that there was an accord and satis-

mail in which consider the amount of the claims to be $850 but this amount was included from the $4,474.17, and a direct verdict returned for twenty-five per cent of the remainder. Appellant argues from this that no specific amount was arrived at, and therefore the court should have instructed the jury to find for the defendant. The testimony of appellant was at least some evidence of the amount, and so taken, where the court allowed the maximum amount in appellant's favor, he is not in a position to complain.

Appellant further contends that there was an accord and satisfaction; that this is shown in every monthly remittance made by appellant covering the entire period of time, wherein he states in enclosing his check that the same was in full for the month mentioned; that about the expiration of the time covered by the second contract, a dispute arose as to the meaning of the contract, both parties then taking the same position that they now take; that shortly afterwards there was correspondence between them and their respective attorneys as to the true meaning of the contract; that several months afterwards, March 4, 1915, appellant made his last payment, and in his letter of that date, stated that the payment was "for the month of September and October, 1914, the balance due from me, to you as trustee of Mr. W. J. Kennedy's estate;" that afterwards, April 16, 1915, appellee excepted and entered in appellant's bill of sale in accordance with the contract, wherein it acknowledged receipt of the consideration providing for it in the contract, and from this appellant contends that there was an accord and satis-

faction. It is true that if a check is offered in payment of a disputed account, it must be accepted by the creditor upon the terms upon which it is offered, or it must be rejected. The acceptance of the check will satisfy the demand, although the creditor protests at the time that it is not all that is due, or that he does not accept it in full satisfaction of his claim. Levinstein v. Dalton, 202 Ill. App. 300; Snow v. Greisheimer, 220 Ill. 106; Ostrander v. Scott, 161 Ill. 339; Canton Coal Co. v. Parlin, 215 Ill. 248. In the instant case, however, the last remittance made was stated to be for the months of September and October, 1914, and appellee acknowledged receipt of the check for the same months. If appellant had tendered this payment upon condition that it was to be in full payment of all claims under the contract, a different question might have been presented, but he did not do so. The acknowledgment in the bill of sale of payment is of no importance, so far as the question which we are now considering is concerned, for appellee enclosed the same in a letter in which it stated: "In the course of a day or two our attorney will file proceedings in court to test our right to collections which you have already made since the end of the five year period and which you may hereafter make for work done during that period."

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Mr. Justice Taylor took no part in the decision of this case.

fraction. It is true that if a check is offered in payment of a disputed account, it must be accepted by the creditor upon the terms upon which it is offered, or it must be vacated. The acceptance of the check will satisfy the demand, although the creditor protests at the time that it is not all that is due, or that he does not accept it in full satisfaction of his claim. Lovingstein v. Taylor, 202 Ill. App. 306; Brown v. Greenheimer, 222 Ill. 166; Kirkendall v. Rhett, 161 Ill. 329; Chicago Coal Co. v. Perkins, 215 Ill. 446. In the instant case, however, the last resistance made was stated to be for the months of September and October, 1924, and appellee acknowledges receipt of the check for the same month. If appellant had tendered this payment upon condition that it was to be in full payment of all claims under the contract, a different question might have been presented, but he did not do so. The acknowledgment in the bill of sale of payment is of no importance, so far as the question which we are now considering is concerned, for appellee cleared the case in a letter in which it stated: "In the course of a day or two our attorney will file proceedings in court to test our right to collections which you have already made since the end of the five year period and which you may hereafter make for work done during that period."

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Mr. Justice Taylor took no part in the decision of this case.

179 - 23144

208 I.A. 260

MARK L. RILEY, Appellant, vs. CITY OF CHICAGO, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Mark L. Riley brought suit against the City of Chicago to recover for personal injuries. There was a verdict and judgment in his favor for $50 to reverse which he prosecutes this appeal.

The only complaint made is that the amount of the judgment is so grossly inadequate as to warrant a reversal. At common law new trials were not awarded upon the grounds that the damages in actions of this character were insufficient, but the modern rule is that a new trial may be awarded where the verdict is grossly inadequate for the same reasons as where the verdict is excessive. Kilmer v. Parrish, 144 Ill. App. 270.

Plaintiff contends that the uncontradicted evidence shows he was severely and permanently injured; that he suffered great pain; that for a period of seventeen months he was unable to perform his work; that he expended more than $250 in physicians' and druggists' bills on account of the injury, and that his actual pecuniary loss was at least $1,600, and therefore the judgment should be set aside and a new trial granted.

170 - 23144

MARK L. MILLER,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Mark L. Miller brought suit against the City of Chicago to recover for personal injuries. There was a verdict and judgment in his favor for $8[illegible] in pursuance of which he prosecutes this appeal.

The only complaint made is that the amount of the judgment is so grossly inadequate as to warrant a reversal. At common law new trials were not granted upon the ground that the damages in actions of this character were insufficient, but the modern rule is that a new trial may be granted where the verdict is grossly inadequate for the same reasons as where the verdict is excessive. Filmer v. Hartigan, 144 Ill. App. 372.

Plaintiff contends that the uncontradicted evidence shows he was severely and permanently injured; that he suffered great pain; that for a period of seventeen months he was unable to perform his work; that he expended more than $800 in physicians' and druggists' bills on account of the injury, and that his actual pecuniary loss was at least $1,800, and therefore the judgment should be set aside and a new trial granted.

Plaintiff's testimony tended to show that prior to the accident he was employed at a dairy just outside of Chicago; that he was strong and healthy and on January 20, 1914, the date of the accident, he was in Chicago on business; that about 6 or 6:30 on that evening he together with his brother-in-law and sister were going to call on friends; that there was just a little snow on the ground; that he was walking behind his brother-in-law and sister on 57th street near La Salle, when he "tripped and fell on a defective place in the walk, plunging forward 8 or 9 feet, and in doing so I went over and struck my hip and side and also my left knee just below the cap, and cut and bruised it severely and destroyed my trousers, and I sprained my right wrist and my spine. I struck my hip against the sidewalk, which is of cement;" that his brother-in-law and sister turned around and assisted him to his feet; that he was in great pain and the three of them went back to see the condition of the sidewalk which had caused him to trip; that the sidewalk had sagged and broken and one side of the break projected a few inches higher than the other; that the three of them then proceeded to their destination, plaintiff being assisted by the other two; they stayed about an hour and a half, and then retruned home which was a distance of about a mile and a half, plaintiff again being assisted by the other two, and all of this time he was suffering great pain. They reached home about 11 o'clock P.M., and plaintiff borrowed a cane and set out in search of a doctor, but he was unable to reach the doctor's office, which was at 55th and State streets, but instead went into a saloon at 5621 State street, where he stayed with some friends about an hour and they then assisted him home. On the following morning he arose about 6 o'clock, took a surface line car and then the

Plaintiff's testimony tended to show that prior to the accident he was employed at a dairy just outside of Chicago; that he was strong and healthy and on January 22, 1914, the date of the accident, he was in Chicago on business; that about 8 or 8:30 on that evening he together with his brother-in-law and sister were going to call on friends; that there was just a little snow on the ground; that he was walking behind his brother-in-law and sister on 37th street near La Salle, when he "tripped and fell on a defective place in the walk, plunging forward 8 or 9 feet, and in doing so I went over and struck my hip and side and also my left knee just below the cap, and cut and bruised it severely and destroyed my trousers, and I sprained my right wrist and my spine. I strain my hip against the sidewalk, which is of cement;" that his brother-in-law and sister turned around and assisted him to his feet; that he was in great pain and the three of them went back to see the condition of the sidewalk which had caused him to trip; that the sidewalk had ragged and broken and one side of the break projected a few inches higher than the other; that the three of them then proceeded to their destination, plaintiff being assisted by the other two; they stayed about an hour and a half, and then returned home which was a distance of about a mile and a half, plaintiff again being assisted by the other two, and all of this time he was suffering great pain. They reached home about 11 o'clock P.M., and plaintiff borrowed a cane and set out in search of a doctor, but he was unable to reach the doctor's office, which was at 16th and State streets, but instead went into a saloon at 32nd state street, where he stayed with some friends about an hour and they then escorted him home. On the following morning he arose about 5 o'clock, took a surface line car and then the

elevated to Elgin, where he and his brother went on business. Afterwards they visited several suburbs of Chicago, and the second day after the accident he went back to the dairy. He remained there about two days and then came to Chicago where he remained one day and then returned to the dairy. On January 28th, eight days after the accident he called on a doctor from the village of Barrington. The doctor found no objective symtons (although it appears that the examination was not very thorough) and advised rest. On February 2nd or 3rd he came to Chicago, procured a photographer and walked to the place of the accident. On February 6th he consulted a physician in Chicago who found upon examination some evidence of bruises on the side and hip. The doctor also found a hernia on the left side, but stated he did not know what caused it, but was of the impression that it was not caused by the fall. The doctor stated that plaintiff appeared to be in pain and that he next saw him about two weeks later and during the following two years saw him about twenty times; he also found some kidney affection. About July or August, 1916, plaintiff consulted another physician in Chicago who was a specialist in kidney disorders, and upon examination he found plaintiff suffering from nephritis or Bright's Disease, and plaintiff was wearing a truss for the hernia. He stated that plaintiff appeared to have lost weight, looked bad, was anaemic and walked with a limp. In May, 1914, about four months after the accident, plaintiff returned to the dairy where his duties required him to work from 3:30 in the morning until 6:30 in the evening. He worked about eight months and in January, 1915, he again returned to Chicago and remained about three months, when he again went to the dairy where he worked for about five months. The evidence further tends to show that

elevated to Elgin, where he and his brother went on business. Afterwards they visited several suburbs of Chicago, and the second day after the accident he went back to the dairy. He remained there about two days and then came to Chicago where he remained one day and then returned to the dairy. On January 28th, eight days after the accident he called on a doctor from the village of Barrington. The doctor found no objective symtoms (although it appears that the examination was not very thorough) and advised rest. On February 2nd or 3rd he came to Chicago, procured a photographer and walked to the place of the accident. On February 6th he consulted a physician in Chicago who found upon examination some evidence of bruises on the side and hip. The doctor also found a hernia on the left side, but stated he did not know what caused it, but was of the impression that it was not caused by the fall. The doctor stated that plaintiff appeared to be in pain and that he next saw him about two weeks later and during the following two years saw him about twenty times; he also found some kidney affection. About July or August, 1916, plaintiff consulted another physician in Chicago who was a specialist in kidney disorders, and upon examination he found plaintiff suffering from nephritis or Bright's disease, and plaintiff was wearing a truss for the hernia. He stated that plaintiff appeared to have lost weight, looked bad, was anaemic and walked with a limp. In May, 1914, about four months after the accident, plaintiff returned to the dairy where his duties required him to work from 3:30 in the morning until 6:30 in the evening. He worked about eight months and in January, 1915, he again returned to Chicago and remained about three months, when he again went to the dairy where he worked for about five months. The evidence further tends to show that

after the accident plaintiff was unable to perform as much work as theretofore and received less pay; that during all the time from the accident up to the time of the trial he suffered pain.

If plaintiff was injured and suffered as above stated, as a result of the accident, then it is manifest that the verdict and judgment are grossly inadequate and should be reversed. No complaint is made that the jury were not properly instructed and we must assume that they were advised fully as to what elements they should consider in estimating plaintiff's damages, and that they found that most of plaintiff's suffering was not the result of the fall on the sidewalk. Plaintiff was represented by able counsel, and his rights appear to have been fully protected. After verdict a motion for a new trial was made and overruled. The trial judge thereby approved the verdict. The judge and jury saw and heard the witnesses and therefore were in a much better position to determine the facts than we are, and after a careful consideration of the entire record, we are unable to say that the verdict is manifestly against the weight of the evidence.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

after the accident plaintiff was unable to perform as much work as theretofore and received less pay; that during all the time from the accident up to the time of the trial he suffered pain.

If plaintiff was injured and suffered as above stated, as a result of the accident, then it is manifest that the verdict and judgment are grossly inadequate and should be reversed. No complaint is made that the jury were not properly instructed and we must assume that they were advised fully as to what elements they should consider in estimating plaintiff's damages, and that they found that most of plaintiff's suffering was not the result of the fall on the sidewalk. Plaintiff was represented by able counsel, and his rights appear to have been fully protected. After verdict a motion for a new trial was made and overruled. The trial judge thereby approved the verdict. The judge and jury saw and heard the witnesses and therefore were in a much better position to determine the facts than we are, and after a careful consideration of the entire record, we are unable to say that the verdict is manifestly against the weight of the evidence.

The judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

185 - 23151

208 I.A. 261

MARY GIROUX, Appellee, vs. BEN GOLDMAN, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Mary Giroux brought suit against Ben Goldman to recover damages for malicious prosecution. There was a verdict and judgment in her favor for $300 to reverse which defendant prosecutes this appeal.

The evidence tends to show that the defendant conducted a store on 47th street, Chicago, and dealt in household and kitchen utensils. He resided in the basement of the store with his family. Plaintiff lived about three blocks from the store and had formerly traded with the defendant. Between seven and eight o'clock in the evening of December 1, 1913, plaintiff and her children were going to a moving picture show and on their way met a neighbor with her children who was also going to the picture show. They stopped at the defendant's store where plaintiff purchased a washboard and requested the defendant to deliver it to her home. The defendant charged the plaintiff with stealing, while in the store, six gas mantels, and on the evening of the next day swore out a warrant, and as a consequence plaintiff was required to go to the police station that evening where she gave bond for appearance. On the next morning the case was tried in the Municipal Court and

MARY GIRDUK,
Appellee,

vs.

BRM COLEMAN,
Appellant.

Appeal from
Circuit Court,
Cook County.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Mary Girduk brought suit against Ben Coleman to recover damages for malicious prosecution. There was a verdict and judgment in her favor for $500 to reverse which defendant prosecutes this appeal.

The evidence tends to show that the defendant conducted a store on 47th street, Chicago, and dwelt in bachelor hold and kitchen utensils. He resided in the basement of the store with his family. Plaintiff lived about three blocks from the store and had formerly traded with the defendant. Between seven and eight o'clock in the evening of December 1, 1913, plaintiff and her children were going to a moving picture show and on their way met a neighbor with her children who was also going to the picture show. They stopped at the defendant's store where plaintiff purchased a washboard and requested the defendant to deliver it to her home. The defendant charged the plaintiff with stealing, while in the store, six pen nutsia, and on the evening of the next day swore out a warrant, and on a warrant plaintiff was required to go to the police station that evening where she gave bond for appearance. On the next morning the case was tried in the municipal court and

plaintiff was discharged.

Plaintiff testified that after purchasing the washboard, she together with her neighbor and the children, proceeded to the picture show, and as they were returning about an hour and a half later, when they were on the opposite side of the street in front of defendant's store, defendant accused her of stealing the gas mantels; that she denied she had stolen them and requested plaintiff to search her, which he refused to do; that the defendant stated that his daughter who was assisting him in the store saw plaintiff steal the mantels; that he told plaintiff if she did not return the mantels he would have her arrested. Plaintiff was corroborated in her version of the matter by the neighbor who was with her.

Defendant testified that when plaintiff was in the store purchasing the washboard, he saw her take six gas mantels and as she and the woman who was with her left the store he followed them and stated to plaintiff that she had stolen the mantels and demanded the return of them; that she denied she had stolen the mantels; that thereupon plaintiff and the woman who was with her and the children left, and in about a half hour thereafter returned, whereupon plaintiff upbraided defendant for accusing her of stealing the mantels in very forcible language, applying several vile epithets to him; that thereupon he said he would have her arrested unless the mantels were returned; that the next day he went to the police station and asked for the prosecuting attorney and procured a warrant for plaintiff's arrest; that he did not know plaintiff's name; that he then accompanied the officers to plaintiff's house where he pointed her out. The evidence further shows that the officers did

plaintiff was discharged.

Plaintiff testified that after purchasing the washboard, she together with her neighbor and the children, proceeded to the picture show, and as they were returning about an hour and a half later, when they were on the opposite side of the street in front of defendant's store, defendant accused her of stealing the gas mantels; that she denied she had stolen them and requested plaintiff to search her, which he refused to do; that the defendant stated that his daughter who was assisting him in the store saw plaintiff steal the mantels; that he told plaintiff if she did not return the mantels he would have her arrested. Plaintiff was corroborated in her version of the matter by the neighbor who was with her.

Defendant testified that when plaintiff was in the store purchasing the washboard, he saw her take six gas mantels and as she and the woman who was with her left the store he followed them and stated to plaintiff that she had stolen the mantels and demanded the return of them; that she denied she had stolen the mantels; that thereupon plaintiff and the woman who was with her and the children left, and in about a half hour thereafter returned, whereupon plaintiff upbraided defendant for accusing her of stealing the mantels in very forcible language, applying several vile epithets to him; that thereupon he said he would have her arrested unless the mantels were returned; that the next day he went to the police station and asked for the prosecuting attorney and procured a warrant for plaintiff's arrest; that he did not know plaintiff's name; that he then accompanied the officers to plaintiff's house where he pointed her out. The evidence further shows that the officers did

not place her under arrest, but she stated she would come over to the station in the evening when her husband returned from work, which she did about nine o'clock; that she gave bail for her appearance in court on the following morning when the case was heard and she was discharged.

An action for malicious prosecution is brought to vindicate the plaintiff. In the instant case plaintiff received a vindication when she was discharged in the Municipal court, and she was again vindicated when the jury returned a verdict in her favor. The action, as its name implies, is brought to recover damages where the plaintiff has been prosecuted, as it is claimed in this case, with malice. We have carefully examined all the evidence, and it is clear that there was no malice on the part of the defendant in swearing out the warrant. Good faith on the part of the defendant in swearing out the warrant is a sufficient defense to an action for malicious prosecution, if the facts under which the arrest was made were sufficient to raise a suspicion of guilt in the mind of a reasonably cautious person. Angelo v. Faul, 85 Ill. 106. We, however, are of the opinion that the defendant in procuring the warrant did not act as a reasonably cautious person would have acted under the circumstances. Plaintiff's reputation for honesty which she bore in the neighborhood where she lived was good. But, in view of all the circumstances in the case, we think the damages are excessive. Therefore, if plaintiff will remit from the judgment the sum of $150 within ten days, the judgment will be affirmed; otherwise, the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

not place her under arrest, but she stated she would come over to the station in the evening when her husband returned from work, which she did about nine o'clock; that she gave bail for her appearance in court on the following morning when the case was heard and she was discharged.

An action for malicious prosecution is brought to vindicate the plaintiff. In the instant case plaintiff received a vindication when she was discharged in the Municipal court, and she was again vindicated when the jury returned a verdict in her favor. The action, as its name implies, is brought to recover damages where the plaintiff has been prosecuted, as it is claimed in this case, with malice. We have carefully examined all the evidence, and it is clear that there was no malice on the part of the defendant in swearing out the warrant. Good faith on the part of the defendant in swearing out the warrant is a sufficient defense to an action for malicious prosecution, if the facts under which the arrest was made were sufficient to raise a suspicion of guilt in the mind of a reasonably cautious person. Angelo v. Ewy, 85 Ill. 106. We, however, are of the opinion that the defendant in procuring the warrant did not act as a reasonably cautious person would have acted under the circumstances. Plaintiff's reputation for honesty which she bore in the neighborhood where she lived was good. But, in view of all the circumstances in the case, we think the damages are excessive. Therefore, if plaintiff will remit from the judgment the sum of $150 within ten days, the judgment will be affirmed; otherwise, the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

192 - 23158

208 I.A. 262

JAMES P. COLLINS, Appellee, vs. THE COUNTY OF COOK, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

James P. Collins brought suit against the County of Cook to recover salary which he claimed was due him as a civil service employe from February 15, 1911, to February 22, 1912. The case was tried before the court without a jury; there was a finding and judgment in favor of the plaintiff for $2,100, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff took a civil service examination for the position of electrician May 23, 1906, was certified to the department of public service and began work June 5, 1906. He was laid off and reinstated at various times, which so far as this case is concerned, is immaterial. In December, 1907, he was again laid off and was notified for reinstatement February 15, 1909. He waived reinstatement February 18, 1909, and on November 29, 1910, withdrew his waiver. He was afterwards reinstated June 16, 1911, worked twenty-nine days and was again laid off July 29, 1911. He was again reinstated in 1912, went to work and has since continued.

192 - 23152

JAMES P. COLLINS,
Appellee,

vs.

THE COUNTY OF COOK,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

208 I.A. 262

MR. JUSTICE O'CONNOR delivered the opinion of the court.

James P. Collins brought suit against the County of Cook to recover salary which he claimed was due him as a civil service employe from February 18, 1911, to February 22, 1912. The case was tried before the court without a jury; there was a finding and judgment in favor of the plaintiff for $2,100, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff took a civil service examination for the position of electrician May 22, 1906, was certified to the department of public service and began work June 5, 1906. He was laid off and reinstated at various times, which so far as this case is concerned, is immaterial. In December, 1907, he was again laid off and was notified for reinstatement February 15, 1909. He waived reinstatement February 18, 1909, and on November 29, 1910, withdrew his waiver. He was afterwards reinstated June 16, 1911, worked twenty-nine days and was again laid off July 29, 1911. He was again reinstated in 1912, went to work and has since continued.

Plaintiff's evidence tends to show that he was reinstated February 22, 1912, and it seems that he is claiming salary from December 1, 1910, until he was reinstated, February 22, 1912, - - the period between the time he withdrew his waiver and the time when he was last reinstated. The evidence, however, is very indefinite as to when plaintiff was actually put back to work.

As we understand plaintiff's contention, it is that when he withdrew his waiver he was entitled to be reinstated, as there were several other electricians at that time working for the county, and he was entitled to one of these places. The record discloses that there were at the time four electricians working for Cook County; viz., Fred L. Miller, took examination 1896, appointed December 30, 1896; Edward L. Huston, took examination November 29, 1898, and was notified for appointment the next day; James I. Payette, took examination May 23, 1906, same day on which plaintiff took it, and was certified for appointment June 5, 1906, also same day on which plaintiff was certified; Thomas Gregson, took examination October 26, 1906, certified for appointment February 24, 1909. Each of these four men was either working as a civil service employe of the County when plaintiff waived reinstatement, February 18, 1909, or was reinstated during the time plaintiff's waiver was in effect and before it was withdrawn, so that it is apparent that plaintiff was not entitled to any one of these four positions; and this, too, even if we should assume that plaintiff proved the legal existence of the positions as required by the rule laid down in Bullis v. City of Chicago, 235 Ill. 472. Plaintiff testified that Patrick O'Brien and Edward Wagner also worked for the County as electricians during the period for which

Plaintiff's evidence tends to show that he was reinstated February 23, 1912, and it seems that he is claiming salary from December 1, 1910, until he was reinstated, February 23, 1912, - - the period between the time he withdrew his waiver and the time when he was last reinstated. The evidence, however, is very indefinite as to when plaintiff was actually put back to work.

As we understand plaintiff's contention, it is that when he withdrew his waiver he was entitled to be reinstated, as there were several other electricians at that time working for the county, and he was entitled to one of these places. The record discloses that there were at the time four electricians working for Cook County; viz., Fred L. Miller, took examination 1898, appointed December 30, 1898; Edward L. Hueton, took examination November 20, 1898, and was notified for appointment the next day; James I. Fayette, took examination May 23, 1906, same day on which plaintiff took it, and was notified for appointment June 8, 1906, also same day on which plaintiff was notified; Thomas Gregson, took examination October 26, 1906, notified for appointment February 24, 1909. None of these four men was either working as a civil service employee of the County when plaintiff waived reinstatement, February 18, 1910, or was reinstated during the time plaintiff's waiver was in effect and before it was withdrawn, so that it is apparent that plaintiff was not entitled to any one of these four positions; and this, too, even if we should assume that plaintiff proved the legal existence of the positions as required by the rule laid down in Bullis v. City of Chicago, 235 Ill. 472. Plaintiff testified that Patrick O'Brien and Edward Wagner also worked for the County as electricians during the period for which

plaintiff is seeking to recover. There is no evidence in the record that either of these men were civil service employes or that they were occupying positions covered by civil service. Plaintiff failed to make out a case, and the judgment is erroneous.

There is another reason why the judgment cannot stand. Section 2 of rule 4 of the Civil Service Commission of Cook County provides that waivers shall not be permitted for a period longer then one year. Appellee waived reinstatement February 18, 1909, and did not attempt to withdraw this waiver until November 29, 1910, a period of more than twenty-one months. The attempted withdrawal at that time was of no effect. The rules of the Civil Service Commission are binding upon the commission, and they had no authority to reinstate plaintiff. Fish v. McCann, 205 Ill. 179.

The judgment of the Circuit Court of Cook County is therefore reversed.

REVERSED.

plaintiff is seeking to recover. There is no evidence in the record that either of these men were civil service employes or that they were occupying positions covered by civil service. Plaintiff failed to make out a case, and the judgment is erroneous.

There is another reason why the judgment cannot stand. Section 2 of rule 4 of the Civil Service Commission of Cook County provides that waivers shall not be permitted for a period longer than one year. Applicant waived reinstatement February 17, 1919, and did not attempt to withdraw this waiver until November 20, 1919, a period of more than twenty-one months. The attempted withdrawal at that time was of no effect. The rules of the Civil Service Commission are binding upon the commission, and they had no authority to reinstate plaintiff. Kirk v. Bishop, 208 Ill. 179.

The judgment of the Circuit Court of Cook County is therefore reversed.

Reversed.

214 - 23180

ANNA KERSUL,

Appellee,

vs.

THE BALDWIN PIANO COMPANY,
(a corporation),

Appellant.

208 I.A. 265

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Anna Kersul brought an action of the fourth class in the Municipal Court of Chicago against the Baldwin Piano Company, claiming $221.65. The case was tried before the court without a jury, there was a finding and judgment in plaintiff's favor for $150, to reverse which defendant prosecutes this appeal.

The record discloses that one Mrs. Toman had an arrangement with a salesman of the defendant company whereby she received certain commissions on sales which she assisted in making. There was evidence tending to show that Mrs. Toman had purchased a piano from the defendant on the installment contract plan; that she had made certain payments and that there was a balance still due from her of $256.13; that she was unable to keep up her payments and suggested to plaintiff that the latter take over her contract; that if she would do so the piano which Mrs. Toman had at her house would be turned over to plaintiff upon payment of $200. Afterwards Mrs. Toman went with plaintiff to defendant's place of business and stated to defendant the proposi-

214 - 2215C

ANNA KERSTL,

Appellee,

vs.

THE BALDWIN PIANO COMPANY,
(a corporation),

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

2081.A. 265

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Anna Kerstl brought an action of the fourth class in the Municipal Court of Chicago against the Baldwin Piano Company, claiming $241.65. The case was tried before the court without a jury, there was a finding and judgment in plaintiff's favor for $150, to reverse which defendant prosecutes this appeal.

The record discloses that one Mrs. Toman had an arrangement with a salesman of the defendant company whereby she received certain commissions on sales which she assisted in making. There was evidence tending to show that Mrs. Toman had purchased a piano from the defendant on the installment contract plan; that she had made certain payments and that there was a balance still due from her of $244.15; that she was unable to keep up her payments and suggested to plaintiff that the latter take over her contract; that if she would do so the piano which Mrs. Toman had at her house would be turned over to plaintiff upon payment of $200. Afterwards Mrs. Toman went with plaintiff to defendant's place of business and stated to defendant the proposi-

tion she made plaintiff. Thereupon defendant prepared a chattel mortgage and note for $256.13 and presented them to plaintiff for her signature. Plaintiff refused to sign the papers and stated that she had agreed to pay $200 for the piano and would not pay any more. Thereupon it was suggested that as Mrs. Toman had certain commissions coming from the defendant and would assign $56.13 of them to the defendant. Thereupon Mr. Johnson, a representative of the defendant, prepared an assignment, which was executed by Mrs. Toman and witnessed by himself, which assignment is as follows:

"April 30th, 1913.

To the Baldwin Co:

I hereby transfer commissions to the amount of $56.13 coming to me on a number of sales made through Mr. Powers to be credited to the Miss Anna Kersul account as the commissions become due. In witness hereof my signature this 30th day of April, 1913.

Dorella Toman.

P. W. Johnson."

This assignment was presented to and examined by the plaintiff, and thereupon she signed the chattel mortgage and note for $256.13. The piano was delivered to her from Mrs. Toman's residence. She made payments of $8 per month to the defendant, and after she had paid $200 and interest thereon amounting to $11.65, she refused to pay more, stating that this was all she agreed to pay. Defendant contended that plaintiff was not to be given credit for the $56.13 unless the transactions out of which these commissions arose were performed by the respective purchasers; that certain of these transactions were not consummated by the purchasers but had lapsed, and that $32.15 of the commissions were not earned, and this amount must still be paid by plaintiff before she

tion she made plaintiff. Thereupon defendant prepared a chattel mortgage and note for $256.15 and presented them to plaintiff for her signature. Plaintiff refused to sign the papers and stated that she had agreed to pay $200 for the piano and would not pay any more. Thereupon it was suggested that as Mrs. Toman had certain commissions coming from the defendant she would assign $56.15 of them to the defendant. Thereupon Mr. Johnson, a representative of the defendant, prepared an assignment, which was executed by Mrs. Toman and witnessed by himself, which assignment is as follows:

"April 30th, 1913.

To the Baldwin Co:

I hereby transfer commissions to the amount of $56.15 coming to me on a quarter of sales made through Mr. Powers to be credited to the Miss Anna Larsen account as the commissions become due. In witness hereof my signature this 30th day of April, 1913.

Dorella Toman.

P. V. Johnson."

This assignment was presented to and examined by the plaintiff, and thereupon she signed the chattel mortgage and note for $256.15. The piano was delivered to her from Mrs. Toman's residence. She made payments of $2 per month to the defendant, and after she had paid $200 and interest thereon amounting to $11.35, she refused to pay more, stating that this was all she agreed to pay. Defendant contended that plaintiff was not to be given credit for the $56.15 unless the transactions out of which these commissions arose were performed by the respective purchasers; that certain of these transactions were not consummated by the purchasers but had lapsed, and that $56.15 of the commissions were not earned, and this amount must still be paid by plaintiff before she

would have a clear title to the piano. The evidence further shows that certain credits were given plaintiff on account of these commissions.

Plaintiff refused to make further payments, and thereupon defendant went to her residence and took the piano, and has retained it since. Witnesses testified as to the value of the piano at the time it was taken from the plaintiff. Plaintiff testified that it was then worth about $200. Witnesses on behalf of the defendant placed the value from $115 to $150. The court entered judgment for the latter amount.

Defendant contends that it was error to introduce parole evidence to vary the terms of the promissory note and mortgage, but this question is not at all involved in the case, as there was no such attempt made.

The only dispute between the parties was as to the meaning of the written assignment of the commissions. We think it clear under all the circumstances that it was the intention of all parties that plaintiff should have a credit of $56.13 on the piano; and while there may be some ambiguity in the assignment itself, since it was prepared by the defendant, it will be construed most strongly against it.

We think that all the facts of the case were not brought to the attention of the trial court. The witness Healy (for the defendant) in testifying to the value of the piano on the day it was taken from the plaintiff, made quite a distinction between a sale made in a store and one in a residence. He stated that it was hard to arrive at the value, because he understood there are many "fake sales" made in homes. This sale was made in a home; and, while allusions

would have a clear title to the piano. The evidence further shows that certain credits were given plaintiff on account of these commissions.

Plaintiff refused to make further payments, and thereupon defendant went to her residence and took the piano, and has retained it since. Witnesses testified as to the value of the piano at the time it was taken from the plaintiff. Plaintiff testified that it was then worth about $200. Witnesses on behalf of the defendant placed the value from $115 to $150. The court entered judgment for the latter amount.

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The only dispute between the parties was as to the meaning of the written assignment of the commissions. We think it clear under all the circumstances that it was the intention of all parties that plaintiff should have a credit of $56.15 on the piano; and while there may be some ambiguity in the assignment itself, since it was prepared by the defendant, it will be construed most strongly against it.

We think that all the facts of the case were not brought to the attention of the trial court. The witness Neely (for the defendant) in testifying to the value of the piano on the day it was taken from the plaintiff, made quite a distinction between a sale made in a store and one in a residence. He stated that it was hard to arrive at the value, because he understood there are many "fake sales" made in homes. This sale was made in a home; and, while allusions

were made a number of times to what Mrs. Toman had originally agreed to pay for the piano and how much she had paid on account, these questions were never answered. It also seems significant that Mrs. Toman, who claimed to have paid something on account at the time it was sold to plaintiff, should be willing to pay $56.13 in addition to what she had already paid, for the privilege of permitting plaintiff to take the piano.

Complaint is made that the court after the evidence was closed continued the case several weeks, and then permitted evidence to be introduced to establish the value of the piano at the time the defendant took it from plaintiff. This was a matter of discretion with the court, and he was fully warranted in hearing the testimony. Moreover, after the case was opened up both sides introduced evidence, and defendant was in no way prejudiced.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

were made a number of times to what Mrs. Toman had originally agreed to pay for the piano and how much she had paid on account, these questions were never answered. It also seems significant that Mrs. Toman, who claimed to have paid something on account at the time it was sold to plaintiff, should be willing to pay $26.13 in addition to what she had already paid, for the privilege of permitting plaintiff to take the piano.

Complaint is made that the court after the evidence was closed continued the case several weeks, and then permitted evidence to be introduced to establish the value of the piano at the time the defendant took it from plaintiff. This was a matter of discretion with the court, and he was fully warranted in hearing the testimony. Moreover, after the case was opened up both sides introduced evidence, and defendant was in no way prejudiced.

The judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

221 - 23187

ROY O. EUSTROM and F. H. SINCLAIR, Co-partners trading as Eustrom & Sinclair,

Appellees,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellant.

208 I.A. 267

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against the defendant railway company to recover the value of four hogs. It was stipulated if there was any liability it was the value of the hogs, which was $48.

The record discloses that plaintiffs shipped a car containing eighty-four hogs from Montana to Chicago under a through contract. One Don Finn was designated by plaintiffs as caretaker of the hogs during transit, and was permitted by the defendant to ride on the train which brought the hogs, free of charge. His duties were to look after the hogs when they were fed and watered, and the loading and unloading of them during the trip as required by the federal law. When the car reached Grand Crossing, Wisconsin, the hogs were unloaded for the purpose of feeding and watering them, and placed in the stockyards there. Finn, who appears to be a young man about twenty-four or twenty-five years of age, was born and raised at that place, and had been staying in Montana; and during the stop at Grand Crossing, he met

HOY O. TUSTISON and Y. X. SINGLAIR,
Co-partners trading as Sinclair & Sinclair,
Appellees.

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF SITKANO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against the defendant railway company to recover the value of four hogs. It was stipulated if there was any liability it was the value of the hogs, which was $48.

The record discloses that plaintiffs shipped a car containing eighty-four hogs from Montana to Chicago under a through contract. One Jim Kim was designated by plaintiffs as caretaker of the hogs during transit, and was permitted by the defendant to ride on the train which brought the hogs, free of charge. His duties were to look after the hogs when they were fed and watered, and the loading and unloading of them during the trip as required by the federal law. When the car reached Grand Crossing, Wisconsin, the hogs were unloaded for the purpose of feeding and watering them, and placed in the stockyards there. Kim, who appears to be a young man about twenty-four or twenty-five years of age, was born and raised at that place, and had been staying in Montana; and during the stop at Grand Crossing, he met

an acquaintance to whom he sold four of the hogs, Finn claiming that he was the owner of them. It is the value of these hogs that is involved in this suit.

A great many authorities are cited on both sides tending to announce the liability of carriers in such case, but we think the question is very easy of solution, and that the citation of authorities is unnecessary. Finn, who was in charge of the car as caretaker, and who wrongfully sold the hogs, was the agent of the plaintiffs, and manifestly the defendant was in no way liable for any loss suffered by the plaintiffs by reason of Finn's dereliction of duty.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

an acquaintance to whom he sold four of the hogs, Finn claiming that he was the owner of them. It is the value of these hogs that is involved in this suit.

A great many authorities are cited on both sides tending to measure the liability of carriers in such cases, but we think the question is very easy of solution, and that the citation of authorities is unnecessary. Finn, who was in charge of the car as caretaker, and who wrongfully sold the hogs, was the agent of the plaintiff, and manifestly the defendant was in no way liable for any loss suffered by the plaintiff by reason of Finn's dereliction of duty.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

68 - 22485

208 I.A. 277

AUSTIN E. GORDON,

Defendant in Error,

vs.

CITY OF CHICAGO, WILLIAM HALE THOMPSON, Mayor, CHARLES C. HEALY, General Superintendent of Police, CHARLES E. FRAZIER, PERCY B. COFFIN and JOSEPH P. GEARY, as Civil Service Commissioners,

Plaintiffs in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a petition for a writ of mandamus filed by Austin E. Gordon in the Circuit Court of Cook County against the plaintiffs in error, to compel the City of Chicago to forthwith place his name "upon the roster of Detective Sergeants of the City of Chicago and upon the pay-roll of said City", that he may at once enter "upon the performance of his duties as a Detective Sergeant in the City of Chicago with the same right to continue in the performance thereof and receive the salary thereof as he had to continue in the performance thereof and receive salary thereof prior to his unlawful removal on the 20th day of June, 1897, subject to the laws, rules and ordinance pertaining to Detective Sergeants in the City of Chicago."

On October 15, 1915, a general demurrer to the petition was filed by the plaintiffs in error. The trial judge overruled the demurrer and upon the plaintiffs in error electing to stand by their demurrer, judgment was

AUSTIN E. GORDON,

Defendant in Error,

MEMOR TO

CIRCUIT COURT,

COOK COUNTY.

vs.

CITY OF CHICAGO, WILLIAM HALE THOMPSON, Mayor, CHARLES C. HEALY, General Superintendent of Police, CHARLES E. FULLER, Harry B. Gutter and JOHN P. O'HARE, as Civil Service Commissioners,

Plaintiffs in Error.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a petition for a writ of mandamus filed by Austin E. Gordon in the Circuit Court of Cook County against the plaintiffs in error, to compel the City of Chicago to forthwith place his name "upon the roster of Detective Sergeants of the City of Chicago and upon the pay-roll of said City", that he may at once enter "upon the performance of his duties as a Detective Sergeant in the City of Chicago with the same right to continue in the performance thereof and receive the salary thereof as he had to continue in the performance thereof and receive salary thereof prior to his unlawful removal on the 27th day of June, 1927, subject to the laws, rules and ordinances pertaining to Detective Sergeants in the City of Chicago."

On October 11, 1928, a general demurrer to the petition was filed by the plaintiffs in error. The trial judge overruled the demurrer and upon the plaintiffs in error electing to stand by their demurrer, judgment was

rendered upon the petition that a writ of mandamus be issued as prayed for.

Upon this appeal it is contended by the plaintiffs in error that, as the petitioner, in filing the petition for reinstatement, has delayed more than six months without showing an excuse for such delay, he was guilty of gross laches and his petition should have been dismissed. The petitioner was summarily discharged from the police force on June 20, 1897 and filed his petition herein on October 7, 1915, over eighteen years afterward. As this court said, in People of the State of Illinois, ex rel. John D. Kavanaugh v. City of Chicago (Gen. No. 21990); "So much time has elapsed that there seems to be no escape from the laches imputable to the relator." For the reasons given in that opinion, based on the decisions therein cited, and, as the relator failed to state in his petition any facts tending to excuse the delay, we are of the opinion that the principle of laches, which is invoked by the demurrer, is a complete bar to the relief, and that the trial court erred in overruling the demurrer to defendant in error's petition for a writ of mandamus. The judgment is, therefore, reversed and, as the relator is not entitled to the writ the cause is remanded with directions to enter an order sustaining the demurrer of plaintiffs in error and dismissing the petition of relator.

REVERSED AND REMANDED WITH DIRECTIONS.

rendered upon the petition that a writ of mandamus be issued as prayed for.

Upon this appeal it is contended by the plaintiffs in error that, as the petitioner, in filing the petition for reinstatement, has delayed more than six months without showing no excuse for such delay, he was guilty of *gross laches* and his petition should have been dismissed. The petitioner was summarily discharged from the police force on June 24, 1897 and filed his petition herein on October 7, 1913, over eighteen years afterward. As this court said, in *People of the State of Illinois, ex rel. John D. Rosenwald v. City of Chicago* (Sup. No. 21390): "So much time has elapsed that there seems to be no escape from the *laches* imputable to the relator." For the reasons given in that opinion, based on the decisions therein cited, and, as the relator failed to state in his petition any facts tending to excuse the delay, we are of the opinion that the principle of *laches*, which is invoked by the demurrer, is a complete bar to the relief, and that the trial court erred in overruling the demurrer to defendant in error's petition for a writ of mandamus. The judgment is, therefore, reversed and, as the relator is not entitled to the writ the cause is remanded with directions to enter an order sustaining the demurrer of plaintiffs in error and dismissing the petition of relator.

REVERSED AND REMANDED WITH DIRECTIONS.

March 17

160 - 23124

McCARTY BROS., a corporation,
Appellant,

vs.

FORT DEARBORN NATIONAL BANK,
a corporation,
Appellee.

208 I.A. 282

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

McCarty Bros., depositor in the Fort Dearborn National Bank, on November 2, 1914, drew a check on its account in the latter bank in the sum of $1880.00, payable to Ohrman Mortgage Co., and delivered it to the payee on that date. The check was given in payment of a note for $1000.00, and interest thereon in the sum of $880.00, due the Ohrman Mortgage Co. On November 4, 1914, the Ohrman Mortgage Co. deposited the check for $1880.00, with the Foreman Brothers' Banking Company and it was passed, at that time, to the credit of the Ohrman Mortgage Co. Endorsed on the face of the check is the following: "Accepted, payable through Chicago Clearing House , Nov. 4, '14, Fort Dearborn National Bank, W. E. McLellan, Teller" and, endorsed on the back of said check is the following: "Paid through Chicago Clearing House, 27, Nov, 4, 1914, Second Receiver, to the Foreman Brothers' Banking Company," from which endorsement it appears that the check was certified by the Fort Dearborn National Bank and paid by the Fort Dearborn National Bank, on November 4, 1914. On December

I&C - 83124

McCARTY BROS., a corporation,

Appellant,

vs.

PORT DEARBORN NATIONAL BANK,
a corporation,

Appellee.

MR. JUSTICE TAYLOR delivered the opinion of the court.

McCarty Bros., depositor in the Port Dearborn National Bank, on November 2, 1914, drew a check on its account in the latter bank in the sum of $1800.00, payable to Chinman Mortgage Co., and delivered it to the payee on that date. The check was given in payment of a note for $1000.00, and interest thereon in the sum of $800.00, use the Chinman Mortgage Co. On November 4, 1914, the Chinman Mortgage Co. deposited the check for $1800.00, with the Foreman Brothers' Banking Company and it was passed, at that time, to the credit of the Chinman Mortgage Co. Indorsed on the face of the check is the following: "Accepted, payable through Chicago Clearing House, Nov. 4, '14, Port Dearborn National Bank, W. H. McLellan, Teller" and, endorsed on the back of said check is the following: "Paid through Chicago Clearing House, 27, Nov. 4, 1914, Second Receiver, to the Foreman Brothers' Banking Company," from which endorsement it appears that the check was certified by the Port Dearborn National Bank and paid by the Port Dearborn National Bank, on November 4, 1914. On December

7, 1914, appellant undertook to countermand the payment of the check and, on that date, notified the bank, in writing, to stop payment on said check. At the time of that notice the bank had already not only certified the check and charged the appellant's account therewith, but paid it. The evidence is somewhat confusing but suggests that a certain note which was held by the Ohrman Mortgage Co., and for the payment of which the check in question was given, was not received by the appellant at the time it gave the check; that subsequently Ohrman Mortgage Co. paid $1100.00 of the $1880.00, the latter being appellant's total debt on its note; that there is still due on that indebtedness, including $88.51 of interest, the total sum of $868.51. The check of November 2, 1914, for $1880.00, payable to the order of Ohrman Mortgage Co., was stamped "Accepted and Paid on November 4, 1914" but does not bear the endorsement of the payee, "Ohrman Mortgage Co."

The only question in the case is whether the failure of the Ohrman Mortgage Co., to endorse the check prevented the title from passing so that on December 7, 1914, when the order of countermand was served on the bank,(appellee) the latter still remained liable.

It is the contention of the appellee that the certification of the check by the appellee, at the request of the payee, relieves the appellant of any obligation or liability, thereafter, to the maker. When the holder of a check procures it to be accepted, as in this case, or certified, the drawer is discharged from liability thereon. Of course, the check itself did not operate as an assignment of any of the funds to the credit of the drawer but, immediately upon its certification, the bank became liable to the holder. (Sections 187-188, Chapter 98, Ill. Revised

7, 1914, appellant undertook to countermand the payment of the check and, on that date, notified the bank, in writing, to stop payment on said check. At the time of that notice the bank had already not only certified the check and charged the appellant's account therewith, but paid it. The evidence is somewhat confusing but suggests that a certain note which was held by the Gurman Mortgage Co., and for the payment of which the check in question was given, was not received by the appellant at the time it gave the check; that subsequently Gurman Mortgage Co. paid $1100.00 of the $1880.00, the latter being appellant's total debt on its note; that there is still due on that indebtedness, including $88.51 of interest, the total sum of $868.51. The check of November 2, 1914, for $1880.00, payable to the order of Gurman Mortgage Co., was stamped "Accepted and Paid on November 4, 1914" but does not bear the endorsement of the payee, "Gurman Mortgage Co."

The only question in the case is whether the failure of the Gurman Mortgage Co., to endorse the check prevented the title from passing so that on December 7, 1914, when the order of countermand was served on the bank,(appellee) the latter still remained liable.

It is the contention of the appellee that the certification of the check by the appellee, at the request of the payee, relieves the appellant of any obligation or liability, thereafter, to the maker. Then the holder of a check procures it to be accepted, as in this case, or certified, the drawer is discharged from liability thereon. Of course, the check itself did not operate as an assignment of any of the funds to the credit of the drawer but, immediately upon its certification, the bank became liable to the holder. (Sections 187-188, Chapter 98, III. Revised

Statutes). On November 4, 1914, long before notice to stop payment was served, the certification of the check discharged the drawer from all his liability thereon. As said in the case of Metropolitan National Bank of Chicago v. Noble Jones, et al, 137 Ill. 634, "As between the bank and drawer, certification has the same effect as payment, the funds representing the amount of the check being just as effectually withdrawn from the control of the drawer, and the indebtedness from the bank to the depositor created by the deposit being just as effectually satisfied to that amount in one case as in the other."

On November 4, 1914, when the check was presented, the bank properly took from the credit account of the appellant the face amount of the check and properly appropriated it in order to pay the check, and the credit account of the appellant, depositor, was to that extent diminished. The certification of the check by the bank created, at once, a contract between the holder of the check and the bank and the bank became then the direct debtor to the holder. Wright v. McCarty, 92 Ill. App. 120. Such being the law, what equity could remain in the maker, after the check was paid, even without the endorsement of the payee? The payee transferred the certified check to the bank and, in its stead, received credit at its face value. Further, the added signature of the payee would not have changed the obligation of the maker or increased the rights of the bank. The latter might have required an endorsement by the payee, but it does not follow that after certification the maker has that right. It does not lie in his mouth to dispute, after the check is certified, the right of the payee to negotiate the check without endorsement. To the lack of endorsement

Statutes). On November 4, 1914, long before notice to stop payment was served, the certification of the check discharged the drawer from all his liability thereon. As said in the case of Metropolitan National Bank of Chicago v. Dahle Lorenz et al, 137 Ill. 634, "As between the bank and drawer, certification has the same effect as payment, the funds representing the amount of the check being just as effectually withdrawn from the control of the drawer, and the indebtedness from the bank to the depositor created by the deposit being just as effectually satisfied to that amount in one case as in the other."

On November 4, 1914, when the check was presented, the bank properly took from the credit account of the appellant the face amount of the check and properly appropriated it in order to pay the check, and the credit account of the appellant, depositor, was to that extent diminished. The certification of the check by the bank created, at most, a contract between the holder of the check and the bank and the bank became then the direct debtor to the holder. Wright v. Hartzky, 92 Ill. App. 182. Even being the law, what equity would remain in the maker, after the check was paid, even without the endorsement of the payee? The payee transferred the certified check to the bank and, in its stead, received credit at its face value. Further, the added signature of the payee would not have changed the obligation of the maker or increased the rights of the bank. The latter might have required an endorsement by the payee, but it does not follow that after certification the maker has that right. It does not lie in his mouth to dispute, after the check is certified, the right of the payee to negotiate the check without endorsement. To the lack of endorsement

no objection is here being made by the payee and we are unable to discover what right the maker has, after the delivery, certification and payment of the check, to object on the ground that it does not contain the endorsement of the payee. Being relieved of all liability by certification, the maker becomes a stranger to all further proceedings involving the check and must be considered as disinterested and having no right to object even if the bank sees fit to pay the check without the endorsement of the payee.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

no objection is here being made by the payee and we are unable to discover what right the maker has, after the delivery, certification and payment of the check, to object on the ground that it does not contain the endorsement of the payee. Being relieved of all liability by certification, the maker becomes a stranger to all further proceedings involving the check and must be considered as disinterested and having no right to object even if the bank see fit to pay the check without the endorsement of the payee.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

198 - 23164

THE CITY OF CHICAGO, a municipal corporation,

Appellee,

vs.

LOUIS B. COHEN,

Appellant.

208 I.A. 288

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The City of Chicago (appellee) brought suit in the Municipal Court against Louis B. Cohen, to recover a penalty not exceeding $200.00, for a violation of certain sections of the Revised Municipal Code of Chicago. The statement of claim recites as follows: "Plaintiff's claim is for a penalty not exceeding $200.00 for a violation by defendant of section 1823, 1848, of the Chicago Code of 1911, in that the defendant did on to-wit; the 10th day of December, A. D. 1915 to to-wit the 23rd day of October, A. D. 1916, at 4410 South Ashland avenue, Chicago, Illinois, wash down water closet not vented or revented; no flush tank provided; check and waste flush." The cause was tried before the court without a jury; the defendant found guilty of a violation of the ordinance and a fine assessed against the appellant in the sum of $25.00, and judgment entered accordingly.

It is claimed by the appellant (1) that the statement of claim does not set forth a cause of action and (2) that there was insufficient evidence to show that appellant

198 - 23164

THE CITY OF CHICAGO, a municipal corporation,

Appellee,

vs.

LOUIS B. COHEN,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

2081.A. 288

MR. JUSTICE TAYLOR delivered the opinion of the court.

The City of Chicago (appellee) brought suit in the Municipal Court against Louis B. Cohen, to recover a penalty not exceeding $200.00, for a violation of certain sections of the revised Municipal Code of Chicago. The statement of claim recites as follows: "Plaintiff's claim is for a penalty not exceeding $200.00 for a violation by defendant of section 1283, 1848, of the Chicago Code of 1911, in that the defendant did on to-wit; the 10th day of December, A. D. 1915 to to-wit the 23rd day of October, A. D. 1916, at 4410 South Ashland avenue, Chicago, Illinois, wash down water closet not vented or revented; no flush tank provided; cheek and waste flush." The cause was tried before the court without a jury; the defendant found guilty of a violation of the ordinance and a fine assessed against the appellant in the sum of $25.00, and judgment entered accordingly.

It is claimed by the appellant (1) that the statement of claim does not set forth a cause of action and (2) that there was insufficient evidence to show that appellant

was in any way connected with, or had any interest in, the premises in question. On the other hand, it is claimed by the appellee, (1) that the record does not show the ordinance; (2) that the so-called bill of exceptions does not comply with any of the provisions of Section 23 of the Municipal Court Act; (3) that where the ordinance is omitted from the record, it is presumed that the trial court found the evidence was sufficient to prove a violation of the ordinance.

The charge is that the defendant violated an ordinance by using a water-closet which was not vented or revented, and which had no flush-tank and no "check and waste-flush"; and the evidence is that on September 22, 1916, one Joseph Sullivan, an inspector in the Sanitary Bureau of the Department of Health of the City of Chicago, went to 4410 Ashland avenue, "that he found installed a wash-down water-closet with apparently no vent-stack, with a check and waste-flush; that on October 23, 1916, he went to the said premises again and found the same conditions existing as on the previous visit; that on January 12, 1917, he went to the premises again and found that a flush-tank had recently been installed for the water-closet, but that there was still no vent stack". Nowhere does it appear in the statement of claim, nor in the evidence, that the appellant was in any way connected with the premises in question, whether in the way of possession or ownership; from allthat appears in the evidence, appellant may never have had anything to do with the premises upon which it is charged the violation of the ordinance took place. The statement of claim and the evidence, taken together, do not make out a cause of action.

was in any way connected with, or had any interest in, the premises in question. On the other hand, it is claimed by the appellee, (1) that the record does not show the ordinance; (2) that the so-called bill of exceptions does not comply with any of the provisions of Section 23 of the Municipal Court Act; (3) that where the ordinance is omitted from the record, it is presumed that the trial court found the evidence was sufficient to prove a violation of the ordinance.

The charge is that the defendant violated an ordinance by using a water-closet which was not vented or ventated, and which had no flush-tank and no "closet and waste-flush"; and the evidence is that on September 22, 1916, one Joseph Sullivan, an inspector in the Sanitary Bureau of the Department of Health of the City of Chicago, went to 4410 Ashland avenue, "that he found installed a wash-down water-closet with apparently no vent-stack, with a closet and waste-flush; that on October 23, 1916, he went to the said premises again and found the same conditions existing as on the previous visit; that on January 12, 1917, he went to the premises again and found that a flush-tank had recently been installed for the water-closet, but that there was still no vent stack". Nowhere does it appear in the statement of claim, nor in the evidence, that the appellant was in any way connected with the premises in question, whether in the way of possession or ownership; from all that appears in the evidence, appellant may never have had anything to do with the premises upon which it is charged the violation of the ordinance took place. The statement of claim and the evidence, taken together, do not make out a cause of action.

Obviously, the appellant did not violate the ordinance in question unless, as agent, tenant, beneficiary, trustee, principal or owner, or in some other capacity, he had some interest in the premises in question.

The contention of the appellee that the bill of exceptions does not comply with Section 23 of the Municipal Court Act is obviously untenable.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Obviously, the appellant did not violate the ordinance in question unless, as agent, tenant, beneficiary, trustee, principal or owner, or in some other capacity, he had some interest in the premises in question.

The contention of the appellee that the bill of exceptions does not comply with Section 23 of the Municipal Court Act is obviously untenable.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

204 - 23170

LIBBY SHULMAN,
Appellee,

vs.

JOHN J. MOSER,
Appellant.

208 I.A. 289

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit in forcible entry and detainer wherein Libby Shulman, appellee, sought to dispossess John J. Moser, appellant, for non-payment of rent. The jury, having found the appellant guilty of unlawfully withholding from the appellee the possession of the premises, judgment was entered on the verdict for possession and an order entered for the issuance of the writ of restitution.

On July 25, 1914, one Victor Kanter, leased in writing to appellant, a flat in the building in question, from October 1, 1914, until September 30, 1916, for $660., payable in monthly installments of $27.50 each, in advance, on the first day of each month of said term. On April 1, 1915, Victor Kanter, by a writing under seal, assigned the said lease to appellee. On August 23, 1916, appellee gave notice in writing to the appellant, of the termination of his lease, and to quit and deliver up possession within ten days, for failure to pay the sum of $27.50 as rent for the month of August, 1916.

It is admitted by appellant that the rent for

204 - 2317C

LIBBY BRENNAN, Appellee,	208 I.A. 289
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
JOHN J. HOSER, Appellant.	

MR. JUSTICE TAECON delivered the opinion of the court.

This is a suit in forcible entry and detainer wherein Libby Brennan, appellee, sought to dispossess John J. Hoser, appellant, for non-payment of rent. The jury, having found the appellant guilty of unlawfully withholding from the appellee the possession of the premises, judgment was entered on the verdict for possession and an order entered for the issuance of the writ of restitution.

On July 25, 1916, one Victor Hunter, leased in writing to appellant, a flat in the building in question, from October 1, 1916, until September 30, 1918, for year, payable in monthly installments of $27.50 each, in advance, on the first day of each month of said term. On April 1, 1918, Victor Hunter, by a writing under seal, assigned the said lease to appellee. On August 23, 1918, appellee gave notice in writing to the appellant, of the termination of his lease, and to quit and deliver up possession within ten days, for failure to pay the sum of $27.50 as rent for the month of August, 1918.

It is admitted by appellant that the rent for

August, 1916, was not actually paid, but it is claimed by appellant that, by reason of a written agreement dated June 12, 1916, appellee agreed to allow him a month's rent for services rendered about the building in question.

In the trial of the case a controversy arose as to the authenticity of the latter alleged agreement. Kanter testified that the signature of appellant was not signed by appellee; that he got a third person to sign her name to the paper. Appellee, also, testified, substantially, that she did not sign it. On the other hand, appellant testified that he drew up the agreement of June 12, 1916 and that Kanter delivered it to him after it was signed, and that the appellee is bound thereby. Evidently appellee was an illiterate woman; reading and writing the English language with difficulty; that is obvious from her testimony and from the fact that the notice to quit was signed by her by means of her mark. The testimony of Kanter seems to convict him of a fraud and it may be that the appellant was imposed upon by means of the alleged written agreement dated June 12, 1916. That whole subject, however, as far as it was material, has been passed upon by the jury. The evidence was presented to them and they have found, we must assume, that at the time the notice to quit was served, the appellant was in default as to the rent for the month of August, 1916, and, as there was evidence beyond a scintilla, which, if taken by itself, tended to prove that fact, there is nothing that we, as a court of review, may do under the law but affirm the judgment.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

August, 1916, was not actually paid, but it is claimed by appellant that, by reason of a written agreement dated June 12, 1916, appellee agreed to allow him a month's rent for services rendered about the building in question.

In the trial of the case a controversy arose as to the authenticity of the latter alleged agreement. Hunter testified that the signature of appellant was not signed by appellee; that he got a third person to sign her name to the paper. Appellee, also, testified, substantially, that she did not sign it. On the other hand, appellant testified that he drew up the agreement of June 12, 1916 and that Hunter delivered it to him after it was signed, and that the appellee is bound thereby. Evidently appellee was an illiterate woman; reading and writing the English language with difficulty; that is obvious from her testimony and from the fact that the writing to quit was signed by her by mark of her mark. The testimony of Hunter seems to convict him of a fraud and it may be that the appellant was imposed upon by reason of the alleged written agreement dated June 12, 1916. That would subject, however, as far as it was material, has been passed upon by the jury. The evidence was presented to them and they have found, we must assume, that at the time the notice to quit was served, the appellant was in default as to the rent for the month of August, 1916, and, as there was evidence beyond a reasonable, which, if taken by itself, tended to prove that fact, there is nothing that we, as a court of review, may do under the law but affirm the judgment.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

231 - 23197

RICHARD MORGAN, doing business as Chicago Decorating Company,

Appellee,

vs.

CHARLES A. ROLAND,

Appellant.

208 I.A. 290

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The appellee brought suit in the Municipal Court for certain painting and paper-hanging in the sum of $80., and interest thereon in the sum of $10. It was tried without a jury and judgment recovered against the appellant in the sum of $90., and costs.

The appellant, in his affidavit of merits alleges that "the goods, wares and merchandise referred to in plaintiff's statement of claim were not furnished to" him, but to one Warren Shay, and, that his, appellee's, "promise to pay for said wares, goods and merchandise, if any such promises were made, was a promise to guarantee the payment by the said Warren Shay", and that the promise, if made, was not in writing. The appellant claims (first) that his promise was a collateral promise to answer for the debt or default of another and was only made orally and is within the statute of frauds; (second) that there was no account stated; (third) that the original contract, if any, amounted only to $45., and there is no liability beyond that amount.

The appellant, who had known Morgan of the appellee company for ten or twelve years, went, together with one Shay

231 - 23197

RICHARD CONAN, doing business as Chicago Recreating Company,

Appellee,

vs.

CHARLES A. WILLIAMS,

Appellant.

2 0 8 I.A. 290

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The appellee brought suit in the municipal court for certain printing and paper-hanging in the sum of $80., and interest thereon in the sum of $10. It was tried without a jury and judgment recovered against the appellant in the sum of $90., and costs.

The appellant, in his affidavit of merits alleges that "the goods, wares and merchandise referred to in plaintiff's statement of claim were not furnished to" him, but to one Warren Shay, and, that he, appellee's, "promise to pay for said wares, goods and merchandise, if any such promises were made, was a promise to guarantee the payment by the said Warren Shay", and that the promise, if made, was not in writing. The appellant claims (first) that his promise was a collateral promise to answer for the debt or default of another and was only made orally and is within the statute of frauds; (second) that there was no account stated; (third) that the original contract, if any, amounted only to $45., and there is no liability beyond that amount.

The appellant, who had been organ of the appellee company for ten or twelve years, went, together with one Shay

and his wife, to see the appellee at his place of business, in order to have some work done in a flat at 1238 East Forty-seventh street. As the result of that conversation, appellant, Shay and his wife, and Morgan's son, Henry Morgan, drove out to the property and went through the rooms that were to be decorated, the work to be done being determined by Mrs. Shay. The next day Henry Morgan sent out some workmen and the work was accordingly done. Subsequently, a bill for $80., was sent by appellee to appellant.

R. Morgan, of the appellee company, testified that sometime after the flat was decorated he met appellant and the latter said, "Morgan, I am positively ashamed that this account was not settled before", and said, further, that "he would give me a note"; that appellant did not object to the amount of the bill; that the work was charged to appellant and no one else spoke to him concerning the work; that appellant said he would see that it was paid in a short time.

A witness, Bessie Levett, who was a clerk for appellee and had charge of sending out bills, testified that about six months after the work was done, when Morgan was not present, appellant asked her if she would give him a message to the effect that "at the present time his money was tied up in stocks and bonds and that he would give Mr. Morgan a note for the work he had done on the South Side for him."

The appellant, Roland, testified that he called on Morgan at his place of business and told him he wanted the flat decorated for a woman by the name of Harriet (meaning Mrs. Shay); that on one occasion he asked Morgan why he did not send the bill to Shay and Morgan said he charged it to him, the appellant; that Morgan told him the first

and his wife, to see the appellee at his place of business, in order to have some work done in a flat at 1832 West Forty-seventh street. As the result of the conversation, appellant, Gray and his wife, and Morgan's son, Henry Morgan, drove out to the property and went through the rooms that were to be decorated, the work to be done being determined by Mrs. Gray. The next day Henry Morgan sent out some workmen and the work was accordingly done. Subsequently, a bill for $30., was sent by appellee to appellant.

H. Morgan, of the appellee company, testified that sometime after the flat was decorated he met appellant and the latter said, "Morgan, I am positively ashamed that this account was not settled before", and said, further, that "he would give me a note"; that appellant did not object to the amount of the bill; that the work was charged to appellant and no one else spoke to him concerning the work; that appellant said he would see that it was paid in a short time.

A witness, Bessie Leavitt, who was a clerk for appellee and had charge of sending out bills, testified that about six months after the work was done, when Morgan was not present, appellant asked her if she would give him a message to the effect that "at the present time his money was tied up in stocks and bonds and that he would give Mr. Morgan a note for the work he had done on the South Side for him."

The appellant, himself, testified that he called on Morgan at his place of business and told him he rented the flat decorated for a woman by the name of Barclet (meaning Mrs. Gray); that on one occasion he asked Morgan why he did not send the bill to Gray and Morgan said he charged it to him, the appellant; that Morgan told him the first

time appellant was there that he did not know Shay; that he said, "I don't know anything about Shay, I charged it to you". Appellant further testified that he told Morgan that Shay wanted some work done and that Morgan said, "I don't know Shay"; that he, appellant, then said, "But I know him and if he does not pay, I will see that you get the money"; that he would like to know what he "was going to stand for", and that appellee sent his son out to look over the work and that appellee's son, Morgan, said it would be around $45; that he, appellant, then said, "As far as that is concerned, it is all right with me"; that subsequently he had a talk with Morgan, in which he, the appellant, expressed surprise that Morgan did not collect the bill from Shay, but that Morgan then said, "I didn't charge it to Shay because I don't know him and if you don't pay me, I will bring suit". He further testified he called on the attorney for the appellee and told him that he would settle the matter for $75; that he did not tell him that it was a woman's bill, that it was for a flat he had decorated for her; that he learned afterwards that Morgan did not accept that proposition.

The contention of the appellant that he introduced Shay to appellee and said to the latter, "Shay wants some work done, and if he does not pay for it, I will"; and that the only promise made by appellant was a collateral one and not an original undertaking by appellant himself, does not seem to be supported by the evidence. Evidently the trial judge was of the opinion that the appellant requested the appellee to do the work and that the latter relied only upon the obligation or promise of the appellant. Of course, there is some conflict in the evidence, but, considering the rela-

time appellant was there that he did not know Shay; that he said, "I don't know anything about Shay. I charged it to you". Appellant further testified that he told Morgan that Shay wanted some work done and that Morgan said, "I don't know Shay"; that he, appellant, then said, "But I know him and if he does not pay, I will see that you get the money"; that he would like to know what he "was going to stand for", and that appellee sent his son out to look over the work and that appellee's son, Morgan, said it would be around $45; that he, appellant, then said, "As far as that is concerned, it is all right with me"; that subsequently he had a talk with Morgan, in which he, the appellant, expressed surprise that Morgan did not collect the bill from Shay, but that Morgan then said, "I didn't charge it to Shay because I don't know him and if you don't pay me, I will bring suit". He further testified he called on the attorney for the appellee and told him that he would settle the matter for $75; that he did not tell him that it was a woman's bill, that it was for a flat he had decorated for her; that he learned afterwards that Morgan did not accept that proposition.

The contention of the appellant that he introduced Shay to appellee and said to the latter, "Shay wants some work done, and if he does not pay for it, I will"; and that the only promise made by appellant was a collateral one and not an original undertaking by appellant himself, does not seem to be supported by the evidence. Evidently the trial judge was of the opinion that the appellant requested the appellee to do the work and that the latter relied only upon the obligation or promise of the appellant. Of course, there is some conflict in the evidence, but, considering the rela-

tions of the parties, and carefully analysing the testimony, we are of the opinion that, under the circumstances, the conclusion of the trial judge was amply justified.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

tions of the parties, and carefully analyzing the testimony, we are of the opinion that, under the circumstances, the conclusion of the trial judge was amply justified.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

339 - 23305

208 I.A. 293

CHARLES HANKE,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $2,000 rendered upon the verdict of a jury in an action for personal injuries. Plaintiff was driving a Ward Baking Company wagon at about 4:10 in the morning of April 20, 1911, and while driving the wagon across the tracks of defendant it was hit by a flat cinder car of defendant and plaintiff was thrown from the wagon and injured. The accident and the injuries to plaintiff are stated in defendant's brief somewhat as follows:

The horses had cleared the rails and the wagon was hit on the rear wheel and turned over. The car stopped and the motorman ran over and picked plaintiff up and with the aid of another man took him to the dector's office. Dr. Gates dressed his wounds, which consisted of a cut on the left side of the head and above the ear, in which he took some stitches, a scratch on the forehead and an injury to his right foot, the big toe being fractured at the second joint and the next toe broken in two places and his foot skinned above the little toe and the next one. Plaintiff testified that he wore an arch support and that it was pretty hard to walk without it. He also complained of headaches and head noises, also dizziness and bleeding of the nose and

DANIEL DAVIS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

Appeal from Superior Court
of Cook County.

Mr. PRESIDING JUSTICE MCGANN
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $2,000 rendered upon the verdict of a jury in an action for personal injuries. Plaintiff was driving a team hauling lumber when at about 4:00 in the afternoon of April 20, 1911, and while crossing the main tracks the trucks of defendant's car was hit by a flat wheel car of defendant and plaintiff was thrown from the wagon and injured. The material and the pertinent to plaintiff are stated in defendant's brief somewhat as follows:

The horses had planted the traily and the car which was hit on the west wheel and backed over. The car winded and the motorman got over and placed plaintiff up and with the aid of another man took him to the doctor's office. Dr. Jaeln dressed his wounds, which consisted of a cut on the left side of the head and above the eye, in which he then sore stitches, a scratch on the forehead and an injury to his right foot, the big toe being fractured at the second joint and the nerve broken in the plaintiff and his foot was not.

Plaintiff testified that he was on his regular job at the traffic hand in well without it. He also complained of headaches and bad voices, also dizziness and bleeding of the nose and

cars, when he had been back at work two weeks after having been laid off for four months.

Thereafter in its brief defendant treats lightly plaintiff's injuries, and argues among other things that the damages assessed are excessive. While there must be another trial, we do not hesitate to say that if plaintiff is entitled to recover and his injuries were as stated in defendant's brief, about which we express no opinion, the damages assessed are not excessive.

We are not prepared at this time to hold that the verdict is not supported by the evidence, or that plaintiff failed to exercise ordinary care for his own safety, or that the defendant was not negligent, as the cause must be reversed for error in the giving of instructions without any regard to the correctness or incorrectness of the foregoing contentions of defendant.

It is contended that instruction No. 4 proffered by plaintiff is erroneous in that it required defendant to exercise such a degree of care as to make it an insurer, when the law requires that it should exercise ordinary care only. Plaintiff meets this contention by arguing that the effect of the instruction was overcome and eliminated by instruction 28 proffered by defendant, in which the jury were expressly instructed to the contrary. Instruction No. 4 is as follows:

> "The jury are instructed that if you believe from the evidence that the motorman in charge of said street car saw or could have seen by the exercise of ordinary care and caution, that the plaintiff, in the exercise of ordinary care for his safety, was going to reach the said intersection of said Whipple street with said car tracks on said Irving Park boulevard before said street car, then it was the duty of the motorman of said street car to so operate and control said street car that he could stop it and avoid a collision, and if you further find from the evidence that said motorman did not have such control of such car, and that by reason thereof said street car collided with said wagon in which plaintiff was riding, and thereby injured the plaintiff as charged in plaintiff's declaration, then you should find the defendant guilty."

ente, when he had been at work two weeks after having been laid off for lack work.

Therefore in its brief defendant states liability plaintiff's injuries, not stress being placed upon claims that the damages assessed are excessive. Which there must be another trial, we do not hesitate to say that if plaintiff is entitled to recover and his injuries were as stated in defendant's brief, about which we express no opinion, the damages assessed are not excessive.

We are not impressed at this time to find that the verdict is not supported by the evidence, or that plaintiff failed to exercise ordinary care for his own safety, or that the defendant was not negligent, as the cause must be reversed for error in the giving of instructions without any regard to the correctness or incorrectness of the foregoing contentions of defendant.

It is contended that instruction No. 4 requested by plaintiff is erroneous in that it required defendant to exercise such a degree of care as to make it an insurer, when the law requires that it should exercise ordinary care only. Plaintiff meets this contention by arguing that the effect of the instruction was cured and eliminated by instruction 12 proffered by defendant, in which the jury were expressly instructed in the contrary. Instruction No. 4 is as follows:

"The jury are instructed that if you believe from the evidence that the defendant is chargeable of which proximate cause of such injuries and damages of which plaintiff complains, and if you further find from the evidence that said defendant did not have such control of such car, and that by reason thereof said driver for defendant with said engine in which plaintiff was riding, not thereby injured the plaintiff as complained in plaintiff's declaration, then you should find the defendant guilty."

We think this instruction subject to the infirmity pointed out by defendant and that the law on the subject was correctly stated in instruction No. 28. The difficulty rests in this condition of the record in our inability to determine which instruction the jury heeded in the weighing of the testimony and in arriving at its verdict. If the principle stated in instruction No. 4 controlled the verdict, then defendant's rights were injuriously affected thereby. If the jury were, however, guided by instruction No. 28, then no harm happened. But which instruction they followed we are not able to determine, and as they are in direct conflict they may have misled the jury to the injury of defendant.

The duty of the defendant and plaintiff toward each other at the crossing at the time of the happening of the accident was of the utmost importance and its solution under the evidence was decisive of the case. It was the crucial point in the case. A similar instruction was held erroneous in Elgin, Aurora & Southern Traction Co. v. Wilcox, 132 Ill. App. 446, in which case the court held that "The only requirement of the law in such case is that the parties exercise ordinary or reasonable care to avoid injuring each other." Again, in West Chicago St. R. R. Co. v. Wizemann, 83 ibid 402, it was held as between a traveller on the track and the street car company, that the only duty which the company owed the traveller was to exercise ordinary care, and in discussing the erroneous instruction the court said:

> "The instruction, bearing as it did on a vital question, namely, the care which it was incumbent on appellant to exercise, could not be cured by any other instruction given, because the jury may have acted on it, regardless of other instructions."

And for the giving of the erroneous instruction the judgment was reversed.

In Sutton this instruction subject to the infamously pointed out by defendant and that the law on the subject was correctly stated in instruction No. 20. The difficulty with in this condition of the record in our inability to determine which instruction the jury heeded in the calculation of the testimony was in arriving at its verdict. If the principle stated in instruction No. 4 controlled the verdict, then defendant's rights were injuriously affected thereby. If not have were, however, guided by instruction No. 20, then we have been deprived. But which instruction they followed we are not able to determine, and as they are in direct conflict they may have misled the jury to the injury of defendant.

The duty of the defendant and plaintiff toward each other at the crossing at the time of the happening of the accident was of the utmost importance and its relation under the evidence was decisive of the case. It was the crucial point in the case. A similar instruction was held erroneous in Dale, Adams & Bookman Trucking Co. v. Tilford, 128 Ill. App. 448, in which case the court held that "the only requirement of the law in such case is that the parties exercise ordinary or reasonable care to avoid injuring each other." Again, in West Chicago St. R. Co. v. Ingersoll, 51 Ill. 620, it was held to between a traveller on the road and the street car company, that the only duty which the company owed the traveller was to exercise ordinary care, and in discussing the erroneous instruction the court said:

"The instruction, bearing on it its face a vital question, namely, the care which is the standard to be applied to strangers, could not be cured if not right in substance given, because the jury may have acted on it, regardless of other instructions."

Not for the giving of the erroneous instruction the judgment was reversed.

We think instruction No. 5, tendered by plaintiff, is misleading on the question of the duty of the motorman where it says that "the plaintiff as a matter of law had a right to rely upon the duty and ability of the motorman in charge of said street car to so operate and control said street car as to avoid a collision." C. C. Ry. Co. v. Strong. 127 ibid 472. This instruction also took away from the jury the determination of the fact as to whether the motorman was in the exercise of ordinary care in controlling his car, or whether he was guilty of a lack of such ordinary care as brought about the accident.

Plaintiff argues, however, that instructions 31 and 33, given at the request of defendant, acted as a curative. This argument is equally as fallacious as that regarding instruction No. 4.

Instruction No. 6 proffered by plaintiff states an abstract proposition of law, which while not reversible error is not to be commended. Furthermore, it has no application to the facts in evidence, and therefore should not have been given.

We do not think instruction No. 7 is subject to the criticism made. The rights and duties of vehicles and street cars at intersecting crossings are correlative.

We perceive no error in the giving of instruction No. 9.

For the errors indicated the judgment of the Superior Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

The court instructions in. 8, tendered by plaintiff, is misleading on the question of the duty of the motorman where it says that "the plaintiff as a matter of law had a right to rely upon the duty and ability of the motorman in charge of said street car to be alert and careful and avoid injury to the plaintiff." 2. R. 22. 7. Bishop, 1st ibid 171. This instruction also took away from the jury the determination of the fact as to whether the motorman was in the exercise of ordinary care in controlling his car, or whether he was guilty of a lack of such diligence over an occasion upon the sidewalk.

Plaintiff states, however, that instructions 2 and 23, given at the request of defendant, make up a sufficient. This argument is equally no justification as that regarding instruction in. 8.

Instruction No. 2 qualified by plaintiff states an abstract proposition of law, which will not reversible error is not to be commended. Furthermore, it has no application to the facts in evidence, and therefore should not have been given.

We do not think instruction No. 7 is subject to the criticism made. The rights and duties of vehicles and street cars at intersecting crossings are correlative.

The gravamen of error is the giving of instruction No. 8.

For the errors indicated the judgment of the superior court is reversed and the cause is remanded for a new trial.

STEPHENS AND MACKINTOSH.

350 - 23316

208 I.A. 295

JOHN BURNS, minor, by his father and next friend, JOHN BURNS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY and HENRY A. BLAIR and JOHN M. ROACH, as Receivers of CHICAGO RAILWAYS COMPANY,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $2500 rendered on the verdict of a jury in an action for personal injuries. The plaintiff, a minor, about the age of seventeen years at the time of the accident, was injured in an attempt to board a car operated by the defendant receivers while it was proceeding south on North Clark street in the vicinity of Ontario street, Chicago.

The material question of fact involved was whether plaintiff attempted to board the car while it was in motion, or whether the car, as he claims, while he was in the act of boarding it, with one foot on the footboard, gave a sudden lurch forward, causing him to lose his balance, dragging him some distance along the roadway until he fell in the street. Plaintiff claims that as a result of the accident he sustained injuries to the left side of his body; that the left side of his head was hurt behind the ear; that he was bruised on his left side; that there was a small "bump" on the left side of his head, and that his left collar bone was fractured in two or three places. Plaintiff claims that

JOHN DOEBY, minor, by his father and next friend, JOHN DOEBY,

Appellee,

vs.

CHICAGO, RAILWAYS COMPANY and HENRY S. WILLY and/or W. ELLIOT, as trustees of CHICAGO RAILWAYS COMPANY,

Appellants.

Action for minor injuries over $5,000.

Appeal from Superior Court of Cook County.

Opinion filed October 3, 1921.

Judgment affirmed.

Mr. PRESIDING JUSTICE BRIGGS

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $5000 rendered on the verdict of a jury in an action for personal injuries. The plaintiff, a minor, about six and a half years of age at the time of the accident, was injured in an attempt to board a car operated by the defendant company while it was proceeding along on Tenth Street street in the vicinity of Carroll street, Chicago.

The material question of fact involved was whether plaintiff attempted to board the car while it was in motion, or whether the car, as he claims, came to a stop at the time of boarding it, with the fact in the foreground, was a minor lad, forward, reaching out to take his chance, dragging the shoe distance along the roadway until he fell in the street. Plaintiff claims that as a result of the accident he sustained injuries to the left side of his body; that the left side of his head was hurt having the car; that he was injured on his left side; that there was a small "lump" on the left side of his head, and that his left eyelid was fractured in two or three places. Plaintiff claims that

some of his injuries were permanent and that at the time of the trial he had not fully recovered from such injuries.

The suit was originally commenced in January, 1911, against the Chicago Railways Company and a declaration was filed alleging negligence against the company. The Railways Company appeared and filed a plea of the general issue and a special plea denying ownership or operation of the car at the time of the accident. In May, 1912, an order was entered amending all proceedings in the case by making Henry A. Blair and John A. Roach, receivers of Chicago Railways Company, defendants, and an amended declaration was filed charging negligence against the receivers. The receivers through their attorneys filed a plea of the general issue to the amended declaration and a special plea denying ownership, control or operation of the street railway or the car at the time of the accident. No plea to this amended declaration was filed by the Chicago Railways Company. The verdict of the jury was, "We, the jury, find the defendant guilty and assess the plaintiff's damages at the sum of $2500." Upon this verdict judgment was entered and the Railways Company and the receivers prayed for and perfected this appeal.

All of the instructions proffered by defendants - twenty-one in number - except two directing a verdict in favor of the Chicago Railways Company, were given to the jury. These were all the instructions asked, the plaintiff not tendering any instructions. No error is assigned involving the instructions, except the two directing a verdict. However, while forty-three assignments of error appear upon the record, but five reasons are argued for reversal. They are: 1. That the court erred in overruling the Chicago Railways Company's motion to instruct the jury to find it not guilty; 2, that the court erred in overruling

some of his injuries were permanent and that at the time of the trial he had not fully recovered from such injuries.

The suit was originally commenced in January, 1911, against the Chicago Railways Company and a judgment was filed alleging negligence against the company. The Railways Company appealed and filed a plea of the general issue and a special plea denying knowledge or operation of the car at the time of the accident. In fact, it, in order was entitled assuming all proceedings in the case by making Henry A. Blair and John A. Mudd, receivers of Chicago Railways Company, defendants, and so amended declaration was filed charging negligence against the receivers. The receivers through their attorneys filed a plea of the general issue to the amended declaration and a special plea denying ownership, control or operation of the street railway or the car at the time of the accident. By plea to this amended declaration was filed by the Chicago Railways Company. The verdict of the jury was, "We, the jury, find the defendants guilty and assess the plaintiff's damages at the sum of $5000." Upon this verdict judgment was entered and the Railways Company and the receivers joined for and prosecuted this appeal.

All of the instructions preferred by defendants - twenty-one in number - except two directing a verdict in favor of the Chicago Railways Company, were given to the jury. These were all the instructions asked, the plaintiff not tendering any instructions. So error is assigned in giving the instructions, except the two directing a verdict. Error, while forty-three assignments of error appear upon the record, but five reasons are argued for reversal. They are: 1. That the court erred in overruling the Chicago Railways Company's motion to discharge the jury by fine in was quality; 2. That the court erred in overruling

the Chicago Railways Company's motion in arrest of judgment; 3, that the verdict is against the weight of the evidence; 4, erroneous rulings on evidence; and, 5, that the damages are excessive.

When plaintiff amended the pleadings by substituting the receivers of the Chicago Railways Company, that Company was automatically eliminated from the case. The declaration in its amended form stood against the receivers alone. An additional count was filed by leave of court, to which the receivers interposed only pleas, thereby evidencing their counsel's understanding that the cause as it then stood was against them and not the company. Upon the trial counsel again stated their understanding of the condition of the pleadings by withdrawing the plea of non-ownership and at the same time making the statement that the "declaration is against the receivers." Furthermore, the cause was tried against the receivers and the verdict and judgment are against them.

It would seem that the present contention regarding the Chicago Railways Company being in the cause as a defendant is an afterthought, for counsel did not raise the point in the trial court. However, on authority, we think the present attitude of counsel fails of support in the record. McLeachen v. Pease, 66 Ill. App. 634, affirmed in 171 Ill. 527, where this precise question was raised, was decided contrary to counsel's contention. This court held that the filing of a new declaration against one defendant worked a discontinuance as to the other; and the Supreme Court decided, as held in Black v. Womer, 100 Ill. 328, that such action was "equivalent to a dismissal of the action as to the other defendant." Zukowski v. Armour, 107

the Illinois insurance commission's making its approval of insurance; 2, that the statutory is equivalent the weight of the criterion; 3, extraneous reliance on criterion; and, 4, that the assumpsits are erroneous.

Then plaintiff attacked the plaintiffs by pointing the receipts of the Illinois business company, that insurer was wrongfully eliminated from the case. The destruction is its assumed they never acquired the insurance alone. In additional cases was filed by Jones of Amsts, in which the receivers intervened only plans, thereby criticing the first circuit's preferringing that the cases as it same stand was equated than and not the company. Then the trial counsel again tried Q-pir counterpleading v. the motions of the plaintiffs by stipulating the plea of non-assumpsit and at the same time making the statement that the "defendants is against the receivers." Furthermore, the court was tried against the receivers and its rulings and judgment are against them.

It would seem that the present contention pertains the Illinois Business Company being in the course as a defendant is an affirmative, for counsel did not raise the point in the trial court. However, as authority, in stead the trial counsel citations of counsel fails of support in the record. Commonwealth v. Evans, 66 Ill. App. 474, affirmed in 173 Ill. 577, where this precise question was raised, the court held counsel's contention. This court held that the filing of a new declaration against non-affirmed model a discontinuance as to the right, and the decision Court Appeal, as held in Elmer v. Cooper, 104 Ill. App. that such action was "equivalent to a dismissal of the case as to the exact defendant." Commonwealth v. Evans, 173

Ill. App. 663. It therefore follows that no error was committed in overruling the Railways Company's motions to instruct a finding in its favor or to arrest the judgment.

There is much contradiction in the testimony of the witnesses for the respective parties as to the manner of the occurrence of the accident. If the jury believed the version of plaintiff and his witnesses, which they undoubtedly did, and disbelieved the version of the witnesses for defendant, which they had a perfect right to do, then we are not at liberty to interfere with the conclusion at which they arrived. Moreover, there are contradictions in the evidence of some of defendant's witnesses as to the manner of the happening of the accident which justified the jury in disregarding much of it. The evidence of plaintiff and his witnesses uncontradicted sustains the charge of negligence. In view of this fact, it is not our province to interfere by disturbing the finding of the jury. Plaintiff's proof met and sustained the allegations of the declaration, of which the original declaration averring negligence against the Railways Company may be included as a part, for the reason that as amended it stood against the receivers in place of the Railways Company.

The order of amendment was broad enough to include the elimination of the Railways Company and the substitution of the receivers in its place. It is that "all papers and proceedings herein be amended by making Henry A. Blair and John M. Roach, receivers of Chicago Railways Company, party defendants," etc. This is sufficiently broad to include the amendment of all the papers then on file and applied as much to the pleas as to the declaration.

III. Ayr. 144. It therefore follows that no error was committed in overruling the railway company's motions to instruct a finding in its favor or to arrest the judgment.

There is much contradiction in the testimony of the witnesses for respective parties as to the manner of the occurrence of the accident. If the jury believed the version of plaintiff and his witnesses, which they manifestly did, and disbelieved the version of the witnesses for defendant, which they had a perfect right to do, then we are not at liberty to interfere with the conclusion at which they arrived. However, there are contradictions in the evidence of some of defendant's witnesses as to the manner of the beginning of the accident which justified the jury in disregarding much of it. The evidence of plaintiff and his witnesses uncontradicted sustains the charge of negligence. In view of this fact, it is not our province to interfere by disturbing the finding of the jury. Plaintiff's proof was not sufficient contradicted the allegations of the declaration, of which the original declaration avering negligence against the railroad company may be included as a part, the proof that he adopted it which entitled the proximate in place of the railroad company.

The order of judgment was proper and should be affirmed. Mr. Justice Dunn, counsel for the plaintiff in error, said, "This is sufficiently broad to include the judgment of all the points that in this and applied as much to the cases as to the declaration.

We find no error in the rulings of the court upon the evidence. Much stress is laid upon the testimony of Dr. Hepburn, who was the attending physician of plaintiff soon after the infliction of the injuries, concerning the connection between the accident and the injury over plaintiff's left ear and the discharge of pus therefrom. We discover no error in the court's admission of such testimony. The opinion of Dr. Hepburn did not invade the province of the jury to determine the fact, which was still left to the jury's determination from Dr. Hepburn's evidence and that of the other witnesses, together with the environing circumstances. West Chicago St. Ry. Co. v. Doherty, 209 Ill. 241.

The report of the motorman, being secondary evidence, was properly excluded. Even were it not so, every fact shown by the report was given in evidence, so that defendant could not be prejudiced by its exclusion. Welden v. Lewis, 71 Ill. 453.

We are unable to say that the damages are excessive. In fact, we are inclined to think they were assessed with due moderation, as plaintiff suffered painful injuries, necessitating a surgical operation and his remaining in the hospital for ten days. He testifies that he suffered much pain, that he was home a month and then had to return to the hospital for treatment, for which he was given an anesthetic. He also suffers from headache and a discharge from the ear and is somewhat deaf. We do not think that the assessment of damages is more than reasonable compensation for the injuries suffered by plaintiff through the negligence of defendant charged in the declaration.

We think justice has been done under the law in this case, that there are no errors in this record justifying a reversal of the judgment of the Superior Court, and it is therefore affirmed.

AFFIRMED.

To find no error in the weight of the court upon the evidence. Such error is laid upon the instructor of Dr. Lapham, who was his attending physician of plaintiff soon after the initiation of the injuries, concerning the causes from which the accident and the injury sued plaintiff's left ear and the discovery of such injuries. He discovered no error in the court's admission of that testimony. The opinion of Dr. Lapham did not invade the province of the jury in determining the fact, which was still left to the jury's determination from Dr. Vedder's evidence and that of the other witnesses, together with the medicine prescriptions. Chas Clarke Co. v. Co. 7. Charles, 91 Ill. 54.

The weight of the evidence, giving proper weight and force, was strongly conclusive. Even more it was so, every fact upon by the report was given in evidence. In fact no fundamental question was raised by the motions. Phillips v. Jones, 71 Ill. 251.

We are unable to say that the damages are excessive. In fact, we are inclined to think that more damages ought to be awarded, on plaintiff's uncontroverted injuries, considering a surgical operation and his remaining in the hospital for the days. In addition that he suffered much pain, that he was a young man that is required for instruments, for which he was given no remuneration. In view multiply from damage and a judgment from the pot and it accordant only. It is not right that the assessment of damages it only that reasonable compensation for the injuries suffered by plaintiff through the negligence of defendant working in the destructions.

By Cook Justice has been some under the law in this case, that there are no errors in this record justifying a reversal of the judgment of the Superior Court, and it is therefore affirmed.

Affirmed.

366 - 23336

JOHN E. PETERSON,
Appellant,

vs.

JOHN E. LANDELL et al.,
Appellees.

208 I.A. 297

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Complainant in the bill in this case seeks to rescind a contract, which he made with the defendant John E. Landell for the purchase of a chemical and grocery business in Chicago, on the ground that he was induced to enter into the contract by fraud and misrepresentation as to the business and the stock which he acquired. The purchase price was $5000, $1000 of which complainant paid in cash, $4000, the deferred payment, being secured on Chicago real estate owned by him.

Landell, after demurring to the bill, which demurrer was overruled, answered, denying all the averments of fraud and misrepresentation alleged against him and also denying that complainant was entitled to the relief prayed. The cause was referred to a master, who took the proofs and reported his findings of fact and law, recommending that the bill be dismissed for want of equity. Objections to his report filed before the master being overruled, they were again filed as exceptions before the chancellor, who overruled them and, in accord with the recommendation of the master, dismissed the bill for want of equity, and complainant prosecutes this appeal.

The defendant Landell on April 19, 1915, executed a bill of sale to complainant, who went into possession

Lord V. Irwin.
Appellant,

vs.

Jack A. Lawrence et al.,
Appellees.

[illegible]

[illegible]

Complainant in the bill is suing over money to replace a mortgage, which he made at the request of the defendants for the purchase of a homestead and property burdened in Chicago, on the ground that he was induced by undue influence and misrepresentations on the part of the defendants and the trust deed be replaced. The property price was fixed, first at $[illegible] and later $[illegible], the defrauded payment, being secured on Chicago real estate owned by him.

Indeed, after investigating in the bill, which the matter was involved, answered, denying all the allegations of fraud and misrepresentation alleged against him and also denying that complainant was mislead in the matter of price. The case was referred to a master, who took the pleadings and heard the testimony of fact and law, recommended that the bill be dismissed for want of equity. Objections to his report filed before the master were overruled, but were again filed as exceptions before the chancellor, who overruling them and, in accord with the recommendation of the master, dismissed the bill for want of equity, and complainant prosecutes this appeal.

The determinant issued on April 13, 1928, ordered a bill of sale to complainant. One week later pro-

of the property conveyed by the bill of sale on the same day. Thereafter, on or about May 20th following, complainant removed the business and property bought of Landell to a new location and incorporated the "Garfield Wholesale Grocery Company" and transferred to said company the business with its stock in trade, for which it gave complainant its capital stock of the face value of $8000. Complainant filed the bill in this case on November 18, 1915, seven months after the transaction attacked was completed.

While many matters are urged upon us why the decree dismissing the bill should be reversed, we think that the complainant's rights rest upon the solution of the question whether he acted with that promptness in his attempt to rescind the contract which the law requires.

Greenwood v. Penn, 136 Ill. 146, is in some respects similar to the instant case on the question of a lack of promptness in seeking to rescind the contract for fraud. It is clear that complainant for seven months treated the property purchased as his own and dealt with it as such owner. He not only removed it from the place where it was when he purchased it, but sold the property to a corporation for stock which was in face value $3000 more than the purchase price which he agreed to pay defendant. Moreover, changes had in many respects taken place in the property which made it impossible to place all the parties in statu quo.

Promptness in rescinding a contract for fraud and misrepresentation is of the very essence of the right to rescind. If fraudulent representations were made, there is nothing in the evidence which would warrant the conclusion that complainant did not discover such frauds long prior to the time he attempted to rescind the contract,

of the property conveyed by the bill of sale as the same day, thereafter, on its above day with following, complainant removed the business and property thought of leased in a new location and identified the "Sheffield Wholesale Company" and transferred to said company the business with its stock in trade, for which it have complained its capital stock of the face value of $9000. Complainant filed the bill in this case on December 12, 1922, seven months after the transaction attacked was completed.

While many matters are urged upon us why the decree dismissing the bill should be reversed, we think that the complainant's rights rest upon the minutes of the creditors whatever is called with that proceeding in its attempt to rescind the contract which the law requires.

Sturgeon v. Ewen, 124 Ill. 148, is in some respects similar to our instant case on the question of a lack of knowledge in seeking to rescind the contract for fraud. It is there that complainant for seven months treated the property purchased as his own and dealt with it as such owner. He not only received it from the place where it was when he purchased it, but sold the property on a contract for stock which was in fact value quite more than the purchase price which he agreed to pay defendant. Thereafter, changes had in many respects been made in the property which made it impossible to place all the parties in their rights.

Prompness in rescinding a contract for fraud and misrepresentation is of the very essence of the right to rescind. If fraudulent representations were made, there is nothing in the evidence which would warrant the conclusion that complainant did not discover such fraudulent intent in the time he should be entitled to rescind the contract.

Having remained silent and treated the property as his own, without complaint or protest, until the maturing of part of the financial obligation which he incurred in purchasing the property, he must be held to be as conclusively bound by the contract as if there had been no misrepresentation or fraud. The law requires a person who has been misled, with all reasonable diligence as soon as he learns the truth, to disaffirm the contract and restore the statu quo as near as may be. This rule cannot be varied. Follett v. Brown, 198 Ill. 244, states the doctrine as follows:

> "It is a settled principle in equity that one who has been misled and defrauded shall not be permitted, after he learns of the fraud, to stand passive and speculate upon the election that the law gives to him either to rescind the contract or waive the fraud, as the events of the future may determine it to be profitable, or otherwise, for him to do. Mr. Pomeroy (2 Pomeroy's Eq. Jur., sec. 897) lays down the proposition that a person who has been defrauded to his injury must, as soon as he learns the truth, with all reasonable diligence disaffirm the contract; that 'if, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations.'"

Grymes v. Sanders, 93 U. S. 55; Bavarian Brewing Co. v. Farrar, 163 Ill. 471.

The decision in Follett v. Brown, supra, is peculiarly applicable to this case in many of its evidential characteristics. It is a case in which the writer of this opinion, who was the trial Judge, thought that the circumstances developed by the facts excused the complainant from complying with the rule of promptness of disaffirmance; but this court and the Supreme court were of a contrary opinion. Complainant in the instant case can no more be excused from the observance of the rule than could the complainant in the Follett case.

Furthermore, a review of the evidence convinces us that the parties dealt at arms length and that complainant

having assessed claims and treated the property as his own, without complaint or protest, until the maturing of part of the financial obligations which he incurred in purchasing the property, he must be held to be as conclusively bound by the contract as if there had been no misrepresentation or fraud. The law requires a person who has been misled, with all reasonable diligence as soon as he learns the truth, to disaffirm the contract and restore the thing got as near as may be. This rule cannot be varied. Pritchard v. Brown, 148 Ill. 648, states the doctrine as follows:

"It is a settled principle to apply that one who has been misled and induced thereby to contract, after he learns of the fraud, is bound speedily and expeditiously to disaffirm that the law gives to him either to rescind it, contract or make the fraud, or by words of the future and determine it to be void(illegible), or otherwise, for this is do. Or, inasmuch is Lawrence is Br. Jur., sec. 577) have done the proposition that a person who has been deceived by his injury made, or also or be lawful the party, with all reasonable diligence disaffirm the contract; that it, after discovering the nature of the representations, he somehow signal with reference to the transaction as though it were still existing and binding, or thereby waive his benefit of and relief from the misrepresentations."

Pennsylvania v. Bentley, 50 N. E. 80; Detroit Electric Co. v. Lutter, 108 Ill. App.

The decision in Pritchard v. Brown, supra, is particularly applicable to this case in view of the evidential characteristics. It is a case in which the value of this property, was the trial judge, thought that the misrepresentations dictated by the facts showed the complainant from complying with the rule of promptness of disaffirmance. But this court and the Supreme Court are of a contrary opinion. Compliance in the instant case can be inferred from the existence of the rule that the complainant in the Pritchard case.

Furthermore, a review of the evidence reveals that the property basis is more logic and that complainant

bought with full knowledge of the situation; that he concluded the purchase after careful examination and inquiry; and that every facility was afforded him by defendant Landell to become informed as to the nature of the property and the business which he was purchasing. The evidence also develops that complainant was an experienced business man when he bought the property which he acquired under the bill of sale, and we agree with the finding of the master that the evidence did not prove that the fraud and misrepresentations charged were practiced. Landell may have driven a sharp bargain and complainant may have been disappointed with his purchase; this, however, does not constitute fraud and misrepresentation.

The decree of the Circuit Court is affirmed.

AFFIRMED.

[illegible] also full knowledge of the situation; that he remained the [illegible] and [illegible] and [illegible] and that every facility was afforded him by defendant [illegible] to [illegible] as to the [illegible] of the property and the business which he was purchasing. The evidence also develops that [illegible] was an experienced business man, that he knew the property which he intended under the [illegible], and he [illegible] with the finding of the master that the evidence did not prove that the fraud and misrepresentations charged were practised. Indeed, any more than a mere [illegible] and complaint may have been [illegible] with the evidence, but, however, does not constitute fraud and misrepresentation.

The decree of the [illegible] court is affirmed.

AFFIRMED.

23459

ADOLPH GIBBERMAN,
Appellee,

vs.

JONAS STANGAL et al.,
On Appeal of MOLLIE FEDER
and JACOB FEDER,
Appellants.

208 I.A. 298

INTERLOCUTORY APPEAL FROM

CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver of mortgaged premises in a foreclosure proceeding. The receiver was appointed without requiring the complainant to give the bond provided by sec. 53, chap. 22 of the Chancery Act, Hurd's R. S., and without stating any fact or reason in the order not requiring the giving of such bond. When the court does not exact a bond, the reason for appointing the receiver without bond must appear by an appropriate recital in the order of appointment. Again, when a receiver's bond is not exacted there must be notice and a full hearing, as the statute requires. Notice of the motion was given, but it is complained that the defendant Mollie Feder was not personally served. The service upon her was by leaving a copy of the notice with her husband and co-defendant. We think this was sufficient and that actual personal service upon her was not necessary.

It is insisted that by the terms of the trust deed sought to be foreclosed the giving of a bond by complainant was expressly waived, thus dispensing with the necessity of any finding in the order of appointment of any ground for such waiver. It is true that parties may in such matters waive their statutory rights, but this does not dispense with

ARTHUR FINNEGAN,
appellee.

vs.

JOHN STANLEY, et al.,
on appeal of JOHNNIE FINNEGAN
and JAMES FINNEGAN,
appellees.

No. 8249. Decided June 20, 1950.

Construing the criminal law of the Andes.

This is an appeal from an interlocutory order sustaining a demurrer of mentioned principle in a furnishment proceeding. The demurrer was sustained without requiring the appellees to give the bond provided by sec. 21, chap. 25 of the Revised Act, Trust's S., and without stating any fact or reason in the order not requiring the giving of such bond. When the court does not exact a bond, the reason for exempting the receiver without bond must appear by an appropriate recital in the order of appointment. Again, when a receiver's bond is not required there must be notice and a full hearing, on the receiver requires. Notice of the notice was given, but it is complained that the defendant entire Trust was not personally served. The service upon her was by leaving a copy of the notice with her husband not co-defendant. We think this was sufficient and that actual personal service upon her was not necessary.

It is insisted that by the terms of the trust deed assets to be transferred the giving of a bond by receiver- not was expressly waived, that inconsistent with the necessity of any finding in the order of appointment or any ground for such waiver. It is true that parties may in most matters waive their statutory rights, but this does not dispense with

the statutory ingredients of the order of appointment. What was waived in the trust deed was notice of the application of an order for a receiver and the giving of a bond by the complainant. This in no wise affected the statutory requirement. The order should have recited that bond was not required because the giving of such bond was waived by the terms of the trust deed. In cases of this character this court looks to the order sought to be reversed, not, as the chancellor might, to the pleadings and the proofs before him.

We are not able to distinguish this case from Schoenecke v. Chicago Title and Trust Co., 178 Ill. App. 387, and the numerous cases there cited.

The order of the Circuit Court is for the foregoing reason reversed.

ORDER REVERSED.

the statutory prerequisite of the order of appointment, that was waived in the trust deed was notice of the application of an order for a receiver and the giving of a bond by the complainant. This is to give effect the statutory requirement. The order should have recited that bond was not required because the giving of such bond was waived by the terms of the trust deed. In spite of this irregularity this court looks to the order sought to be reversed, not, as the dissenter claims, to the pleadings and the proofs before him.

We are not asked to distinguish this case from Commonwealth v. Chicago Title and Trust Co., 175 Ill. App. 447, and the numerous cases there cited.

The order of the circuit court is for the reversed and remanded.

Order accordingly.

23548

208 I.A. 299

A. T. STEARNS,
Appellee,

vs.

INGA SWANSON,
Appellant.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order granting an injunction without notice. Among other things restrained is the collection of three judgments theretofore obtained by defendant against complainant. The bond exacted and given did not provide for the payment of the judgments in the event that the injunction should thereafter be dissolved. This was violative of the statute, sec. 8, chap. 69, R. S., which counsel for complainant confess in their brief.

Defendant asks for damages. With the assessment of damages we are not concerned. The matter of the assessment of damages is for the chancellor.

The injunctional order appealed from is reversed.

ORDER REVERSED.

A. T. STEWART,
Appellee.

vs.

THOS BRADLEY,
Appellant.

CHANCERY COURT OF COOK COUNTY.

No. 208 T.A. 299

PRESIDING JUSTICE BURKE.

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order granting an injunction without notice. Among other things restrained is the activities of three judgments theretofore obtained by informers against complainant. The bond executed and given did not provide for the payment of the judgments in the event that the injunction should thereafter be dissolved. This was violative of the statute, see. 2, chap. 22, R. S., which command for overpayment evidence in their trial.

Referees also for damages, with the assessment of damages on are not permanent. The matter of the assessment of damages is for the chancellor.

The injunctional order appealed from is reversed.

JUDGE DISSENTS.

306 - 23272

208 I.A. 300

ROBERT W. DUNN,
Appellee,

vs.

SEIG NATENBERG and
B. NATENBERG,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On February 18, 1913, the defendants, Seig Natenberg and B. Natenberg, leased certain premises in Chicago to one John Doyle to be occupied "for a moving picture theater" for a term ending on the 28th day of February, 1918, for a total rental of $9,000, payable $150 every month in advance. A writing attached to the lease recited that the lessee had deposited $1,800 with the lessor, and that this sum was to be held by the lessor until the end of the term, at which time it was to be returned to the lessee with interest at 3%. It was also set forth in the wrting that -

> "It is further agreed that in the event said parties of the second part default in the payment of the rent or of any other of the terms and conditions of this lease, then said $1,800 above referred to shall be retained by the party of the first part as and for their liquidated damages on account of said default or breach, and the interest of the second parties in and to this lease shall cease and determine."

The interest of Doyle, the lessee, in the lease and deposit were assigned to J. Frundt and F. J. Flaherty, who subsequently assigned them to Charles Simonson, who in turn assigned them to Catherine V. Stiles, who was the assignor of the plaintiff, Robert W. Dunn.

On the 4th day of November, 1913, the defendants served a written demand upon Catherine V. Stiles for possession of the premises leased, and thereafter the defendants brought

suit against her and on November 18, 1913, obtained a judgment for possession of the premises in question.

It is asserted by the defendants that Catherine V. Stiles abandoned the premises and caused them to remain closed for a period of two months; that by reason thereof the value of the premises for theater purposes had been depreciated, and that defendants had been compelled to spend $1,200 in changing the theater into stores; that at the time the lease was executed the defendants had spent a considerable sum of money in enlarging the theater; that the $1,800 in question, if due at all, was not legally demandable until the expiration of the term, March 1, 1918, and further that the defendants were legally entitled to retain the $1,800 as liquidated damages. On the trial in the Municipal court the jury rendered a verdict in favor of the plaintiff for the sum of $1,843.10. Judgment was entered upon the verdict, and the defendants bring the case here by appeal for review.

The evidence heard upon the trial shows that Catherine V. Stiles did not voluntarily give up the possession of the premises at any time prior to the judgment in the Municipal court on November 18, 1913. There is some evidence in the record to the effect that she had not carried on business for some days prior to her dispossession, and she testified, "We gave the last show on the 6th of November"; that the theater was not opened on the 7th of November because the City had ordered it closed on account of unsanitary conditions. It is fairly inferable that in determining the amount of the verdict rendered by the jury, the sum of $193.10 was added to the amount of the deposit, and that there was deducted therefrom the sum of $150 for rent due under the lease. The deposit in question was made for the express purpose of securing compliance by the lessee or his assignee of the terms and con-

suit against her and on December 29, 1931, obtained a judgment for possession of the premises in question.

It is asserted by the defendants that notwithstanding the premises was caused them to remain closed for a period of two months; that by reason thereof the value of the premises for theatre purposes has been impaired, and that defendants had been compelled to spend $1,400 in remodeling the theatre into stores; that at the time the lease was executed the defendants had spent a considerable sum of money in enlarging the theatre; that the $1,400 in question, if due at all, was not legally demandable until the expiration of the term, June 1, 1932, and finally that the defendants were legally entitled to retain the $1,400 as liquidated damages. On the trial in the municipal court the jury rendered a verdict in favor of the plaintiff for the sum of $1,447.71. Defendants are urging upon the reviewing court the determinative ruling, the mere fact of appeal for review.

The evidence bears upon the issue that defendants, during the 1931 vacation, made no effort to secure the permission of the landlord or any other party to the judgment in the municipal court on December 29, 1931. There is some evidence in the record to the effect that she had not arrived at terms for some days prior to the disagreement, and she testified, "We gave the last check on the 4th of December; that the theater was not opened in the fall of December because the city had created it closed on account of unsanitary conditions. It is further indicated that in determining the amount of the verdict rendered by the jury, the sum of $1,400 was added to the amount of the deposit, and that there was deducted therefrom the sum of $100 for rent due under the lease. The contention is strenuously made for the defendants because of asserting conclusions by the trial court in its rendition of the issue not con-

ditions of the lease, the most important of which was the promise of the lessee to pay rent.

We have examined the evidence heard upon the trial and we have been unable to discover any violation of the terms and conditions of the lease, except that the assignor of the plaintiff had failed to pay a month's rent. The evidence is far from disclosing that the plaintiff's assignor had, as asserted by defendant, abandoned the premises, and from the evidence it is not easy to believe that she would have done so, thereby forfeiting the whole sum of $1,800. We think the evidence is conclusive that Catherine V. Stiles was dispossessed of the premises in question by the legal action brought by the defendants against her. It is true that at the time the suit for possession was brought she was indebted to the defendants for rent, and under the circumstances the defendants could have sued her for the rent, or they could have deducted the amount due them from the deposit in their hands. So far as the evidence shows, defendants saw fit to bring suit for possession, and having taken possession of the property through legal process, they insist now that they have the legal right to the possession of the premises, and also the money deposited with them to secure the performance of the promises made by the lessee.

It is asserted that the $1,800 deposited should be regarded under the circumstances as liquidated damages. The decisions with reference to this subject are not at all harmonious. In some jurisdictions it has been held that a lessor could treat a sum deposited to secure the performance of the terms of a lease as liquidated damages, but these holdings were usually based upon leases which expressly provided that a judgment for possession would not

difficulty of the issue, the most important of which was the liability of the insurer to pay that.

We have examined the evidence bearing upon this and we have been unable to discover any violation of the time and conditions of the issue, except that the policyholder of the plaintiff had failed to pay a month's rent. The evidence is far from disclosing that the plaintiff's negligence has, as asserted by defendant, aggravated the premises. And from the evidence it is not easy to believe that the conditions done so, thereby frustrating the whole use of it,etc. To raise the argument is sufficient indication ?, unless the interpretation of the provisions is question of the legal notion brought by the defendants against her. It is true that at the time the rent for December was brought she was indicted in the defendants for rent. And when the circumstances the defendants would have paid for the rent, if that rent had been tendered the amount its time from the expiration it would lapse. So far as the evidence stands, defendants now fail to justify their proceedings, and having taken possession of the premises through legal process, their insist now that that gave the legal right to the possession of the premises, and also the money depositing with them to secure the performance of the conditions made by the insurer.

It is observed that the $3,500 deposited needs to proceed under the circumstances as disclosed during. The decisions also relations to this matter are not which conclusive. In some jurisdictions it has been held that a lessee could treat a use depending to assure the performance of the terms of a lease or liquidated damages, but those decisions were mostly based upon limits clause expressly stipulated that a judgment for possession would not

deprive the landlord of the right to retain a deposit. (Longobardi v. Yuliano, 67 N. Y. Supp. 903). Where a lessor elects to take advantage of his legal right to terminate a lease for the failure to pay rent on the part of the lessee, and such lessee is dispossessed of the premises by due process of law, such lease, under the decisions in this State, must be regarded as terminated and the contractual relationship between the lessor and the lessee thereby dissolved. Snell v. Owen, 63 Ill. App. 377. Weber v. Roy, 183 Ill. App. 200.

Under the circumstances shown by the evidence it must be held that the defendants, the lessors of the premises, had, by their own act, chosen to put an end to the lease, to secure the performance of the terms and conditions of which the deposit in question was made.

In Radloff v. Haase, 196 Ill. 368, the Supreme court said:

> "Whether the term 'liquidated damages' is used or not, the idea of the courts is to ascertain, if possible, the actual damages sustained, and if it is possible to ascertain the actual damages, or if the amount of liquidated damages mentioned in the contract is exorbitant, the court will construe the amount as a penalty, rather than as liquidated damages. It is said in the Scofield case, supra, that the phrase 'liquidated damages' has often been made to read 'penalty' if the strict construction of the phraseology would work oppression upon the obligor, or, if the enforcement of the contract would be unconscionable, the courts will then construe the amount named in the contract as a penalty. And it seems from all the cases that, whatever may be the wording of the contract, the courts will admit evidence as to whether or not the strict enforcement of its provisions would work a hardship upon the obligor."

The evidence submitted to the jury tended to prove that plaintiff's assignor occupied the premises for theater purposes until she was ordered to close them by the City authorities. If under the terms of the lease she was required to make repairs demanded by the Health Depart-

Hardly have involved of this might be taken a decision.

(Lawrence) v. Tallman, 67 S. E. 499, 501. Since a

lawyer-client is very strongly of his legal right to bring in bound-

ness a lease for the failure to pay rent on the part of the

lessee, and such lease is dispositive of the problem by

the process of law, such lawyer, under the decisions in this

state, must be regarded as acquainted and his authorized

relationship between the lessor and the lessee (client) dis-

solved. Smith v. Jones, 84 Ill. App. 277, Under v. Ent,

148 Ill. App. 609.

Under the circumstances given, in the problem

it must be held that the defendants, the lessees of the

premises, had, in their mind, right to let go and go the

lease, to secure the performance of the terms and conditions

of which the deposit in question was made.

In Bailey v. Shaw, 197 Ill. 391, the decision

went well:

"However the term 'liquidated damages' is used

or not, the idea of the entire is to ascertain, if prac-

ticable, the actual damage sustained, and if it is practi-

cable or ascertain the actual damage, or if the amount of

liquidated damage mentioned in the agreement is excessive,

the court will treat the sum as a penalty, notwithstand-

ing the liquidated damage. It is held in the leading

case, supra, that the phrase 'liquidated damages' is

often used in such 'penalty' of the kind which con-

sideration of the phraseology would not determine upon

the effect, or, of the relationship of the parties

would be treated accordingly. The courts will look behind

the contract agreed to the contract be a penalty. And if

there is all the same fact, whatever may be the nomen-

clat of the contract, the courts will right relieve be

in contract of the actual damages of the breach

where really such a penalty was the object."

The majority decision in the Jury review is

proof that plaintiff's claimant standing in contract for

damage purchase would not be entered in claim made by

the city defendants. If under the terms of the lease

was violated in some private damages of the lessee's view

ment of the City, she had in turn the right to make such repairs and to occupy the premises. The evidence justifies the inference that she was dispossessed of the premises for the reason that she had failed to pay rent due under the lease. The damage which accrued to the defendants from the violation of this promise was readily and definitely ascertainable by reference to the lease. These damages would amount to $150 for each month that she failed to pay the rent agreed upon. Under such circumstances it would be most inequitable to allow the defendants to retain the amount deposited with them.

Defendants sought to prove on the trial that at the time the lease was executed they had spent a considerable sum of money in remodeling the premises in question. The court properly excluded evidence of the amount of these expenditures. No doubt these expenditures were made for the purpose of securing the execution of the lease with the original lessee, but the lease itself did not expressly provide for any reimbursement to defendants for these expenditures other than the promise of the lessee to pay rent.

It is also insisted that the court erred in refusing defendants' offer of proof that they had sustained damages as a result of the fact that the plaintiff's assignor had ceased to operate a theater in the premises and because she had in fact abandoned the premises.

The affidavit of merits filed by the defendants sets forth that the "lessee in said lease owes these defendants for rent of the premises," and that the defendants had sustained actual damage on account of the abandonment and vacation of said premises by the plaintiff. The latter charge was not proved; the first was admitted.

most of her city, was had in view the right to make such repairs and to supply the premises. The evidence justifies the inference that she was disappointed of the premises for the reason that she had failed to pay rent for which the lease. The damage which accrued to the defendants from the violation of this promise was readily not definitely ascertainable by reference to the lease. Their lawyers would account to give for each month that she failed to pay the rent stated sum. Under such circumstances it would be most impossible to allow the defendants to retain the amount demanded with lease.

Judgment should be given on the total that at the time the lease was terminated they had spent a reasonable sum of money in remedying the premises in question. The most probably admitted evidence of the amount of these expenditures. Or these items expenditures were made for the purpose of securing the execution of the lease with the original lessee. Yet the lease itself did not definitely provide for any reimbursement in defendants for these expenditures. Other than the growing of the lease to pay rent.

It is also insisted that the court erred in refusing unfavorable effect of proof that they had sustained damages as a result of the fact that the plaintiff's daughter had caused to operate a theater in the premises and therefore the act in fact abandoned the premises.

The efficacy of merits filed by the defendants was first that the "damage in said lease were those defendants for rent of the premises," and that the defendants had sustained actual damage on account of the commencement and negotiation of said premises by the plaintiff. The latter charge was not proved; the first was admitted.

So far as the evidence discloses the termination of the lease was brought about by the act of the defendants, and we are unable to understand how they can consistently claim that they are entitled to damages because of the fact that the closing of the theater for some weeks had rendered the property unprofitable for theater uses. We think the court did not err in excluding this evidence. While as a matter of fact it may be quite true that the closing of the theater would have some effect upon its patronage and possibly might cause the further operation of such business unprofitable, the defendants are not in a position to claim damages on account thereof. At and before the date of the judgment for the possession of the premises was entered, plaintiff's assignor had a legal right to conduct a theater business in the premises if she saw fit to do so, and whether she did so or not, the defendants were amply protected for rent reserved in the lease by the deposit in their hands.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

308 - 23274

208 I.A. 302

F. N. MATTHEWS & COMPANY,
a corporation,
Appellant,

vs.

MORRIS LILIENTHAL et al.,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court to recover from the defendants the sum of $673.14. A contract which furnishes the basis for the action is as follows:

"This contract entered into this 15th day of March, 1916, by and between F. N. Matthews & Company, a corporation, and Lilienthal, Berman & Elisberg, both of the City of Chicago.

It is understood that said Lilienthal, Berman & Elisberg are desirous of selling said F. N. Matthews & Company merchandise from time to time, and in consideration of that fact, they hereby guarantee that they will not sell to any firm, or store, or person, in Chicago, any style on which said F. N. Matthews & Company have placed an order, nor will they sell any garment made similar to any style that they have sold F. N. Matthews & Company, and they further agree not to sell or show to any firm, or store, or corporation north of Jackson street on Michigan avenue.

Lilienthal, Berman & Elisberg agree that if they violate either of these provisions they will then, in that event, immediately make an allowance of Two ($2.00) Dollars net on every garment of every style which they have sold to F. N. Matthews & Company during the season and up to January 1st, 1917, and pay same in cash to said F. N. Matthews & Company, and in addition the said F. N. Matthews & Company have the privilege of returning to said Lilienthal, Berman & Elisberg, any and all garments that they may have in stock at such time made by said Lilienthal, Berman & Elisberg, it being distinctly understood that said allowance is not a penalty, but is given as liquidated damages, the exact amount of said damages, it being agreed, is not possible to find out.

Lilienthal, Berman & Elisberg
By M. Lilienthal.
F. N. Matthews & Company,
By E. B. Grossman, Pres."

In a second amended statement of claim plaintiff alleged that it was engaged in selling women's high grade wearing apparel; that it originated its own designs

Dec - 1976

208 I.A. 302

P. S. PATTERS & COMPANY,
a corporation,
Appellant,

vs.

MARTIN LILIENTHAL et al.,
Appellees.

APPEAL FROM MONTGOMERY
COUNTY ST LOUIS.

MR. JUSTICE DRUMM DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court to recover from the defendants the sum of $673.34. A contract which furnishes the basis for the action is as follows:

"This agreement entered into this 12th day of March, 1918, by and between P. S. Patters & Company, a corporation, and Lilienthal, Inman & Gilbert, with of the City of Chicago.

It is understood that said Lilienthal, Inman & Gilbert are desirous of selling unto P. S. Patters & Company merchandise from time to time, and in consideration of that fact, the merchandise purchasers then will not sell to any firm, or store, or person, in Chicago, any styles on which said P. S. Patters & Company have placed an order, nor will they sell any merchandise to any firm which they have been said P. S. Patters & Company, nor the further agree not to sell or show to any firm, or store, or corporation north of Jackson street on Clinton avenue.

Lilienthal, Inman & Gilbert agree that if any styles other of those provided that will item, in that event, immediately make an allowance of the [illegible] Jackets and on every garment of every style which they have sold to P. S. Patters & Company during the season and or in January 1917, and for use in [illegible] to said P. S. Patters & Company, and in addition the said P. S. Patters & Company have the privilege of returning to said Lilienthal, Inman & Gilbert, any and all garments that they may have in stock at such time and to said Lilienthal, Inman & Gilbert. If their activity manufactured that will allowance is not a penalty, but is given as liquidated damages, for exact amount of said damages, it being agreed, is not possible to find out.

Lilienthal, Inman & Gilbert
By E. Lilienthal.
P. S. Patters & Company,
By R. S. Greenbaum, Pres."

In a second amended statement of claim plaintiff alleged that it was required to deliver goods to defendant's order upon receiving assurance that it substituted its own invoice

for such apparel, and that it entered into the contract with defendant above set out; that after the execution of the contract it placed orders with the defendants from time to time, and that defendants had manufactured for and delivered to it 547 garments, all of which were made from designs prepared by plaintiff; that the defendants, in violation of their written contract with plaintiff, had, without plaintiff's knowledge or consent, sold to certain of plaintiff's competitors various styles of clothing, orders for which had been given to the defendants by plaintiff; that the plaintiff, on being apprised of this breach of contract, had tendered to defendant 99 garments which had been delivered to plaintiff under the terms of the contract; that it had sustained substantial damages by reason of the alleged breach of contract on the part of the defendants.

The defendants in a statement of counterclaim alleged that the plaintiff was indebted to them in the sum of $1,796.18 for coats and suits made, sold and delivered to the plaintiff.

On motion of defendants, plaintiff's second amended statement of claim and its amended affidavit of merits to defendant's statement of counterclaim were stricken from the files, and the plaintiff, electing to stand by its statement and affidavit, a judgment was entered by the trial court on the defendants' statement of counterclaim for the sum of $1,796.18. Plaintiff seeks by this appeal to reverse this judgment.

We think the trial court did not err in striking plaintiff's statement of claim from the files. Plaintiff's claim is based upon an alleged failure on the part of the defendants to comply with the requirements

the part of the defendants in conflict with the testimony
Plaintiff's claim is based upon an express contract
existing plaintiff's employment at Cline Gas Cline.

So stood the trial court did not err in
in this respect if therein this judgment.

Plaintiff sued for $1,750.00, plaintiff sued
counterclaim for the sum of $1,750.00, plaintiff sued
sued by the first part on the defendants' employment of
sued by the defendants, a judgment was re-
around by its employment and affidavit, a judgment was re-
strictive from the file, but the plaintiff, stating is
series to defendant's statement of employment here
assuming statement of claim and its amended affidavit of
of $1,750.00 for cash and notes, and had delivered
to the plaintiff.

On motion of defendants, plaintiff's counsel
alleged that the plaintiff was induced to take in the sum
of $1,750.00 for cash and notes, and had delivered
to the plaintiff.

The defendants in a statement of contradiction
denying by reason of the alleged breach of contract on the
part of the defendants.

Plaintiff's counsel alleged that the plaintiff was induced to take in the sum
of $1,750.00 for cash and notes, and had delivered
to the plaintiff.

On motion of defendants, plaintiff's counsel
assuming statement of claim and its amended affidavit of
series to defendant's statement of employment here
strictive from the file, but the plaintiff, stating is
around by its employment and affidavit, a judgment was re-
sued by the first part on the defendants' employment of
counterclaim for the sum of $1,750.00, plaintiff sued
in this respect if therein this judgment.

So stood the trial court did not err in
existing plaintiff's employment at Cline Gas Cline.
Plaintiff's claim is based upon an express contract
the part of the defendants in conflict with the testimony

of the written contract. While no formal written pleadings are required in fourth class cases in the Municipal court, the statute does require that in such actions a statement of claim must show that the plaintiff has a good cause of action and the affidavit of merits must show that a defendant has a legal defense. Section 40 of the Municipal Court Act provides that a statement of claim need not "set forth the cause of action with the particularity required in a declaration at common law." Notwithstanding this provision of the law, it was held in Gillman v. Chicago Railways Co., 268 Ill. 305, that a statement of claim in a fourth class case in the Municipal court must show a legal liability of a defendant to a plaintiff.

The defendants agreed in the contract that they would "not sell to any firm, or store, or person, in Chicago, any style on which said F. N. Matthews & Co. have placed an order, nor will they sell any garment made similar to any style that they have sold F. N. Matthews & Co." and they further agreed "not to sell or show to any firm, or store, or corporation North of Jackson street on Michigan avenue," etc.

The defendants agreed, as we construe the contract, not to sell any like or similar garments to plaintiff's competitors within the territorial limits specified in the contract. No time limit is fixed in the contract within which the parties were required or permitted to comply with its terms.

The contract is unilater; it does not require the performance of any promises made by the plaintiff. Under its terms it is made optional with the plaintiff whether it should order any, and, if so, how many garments from the defendants. The contract expressly requires the

of the written contract. While no formal written pleadings are required in Court since once in the Tribunal court, the statute does require that in such actions a statement of claim must show that the plaintiff has a good cause of action and the affidavit of merits must show that a defendant has a legal defence. Section 21 of the Substantial Justice Act provides that a statement of claim need not "set forth the cause of action with the particularity required in a declaration at common law." Substantiating this provision of the law, it was held in Kilgour v. Mercantile Insurance Co., 1 O.R. 111. 113, that a statement of claim in a Court case case in the Tribunal court must show a legal liability of a defendant to a plaintiff.

The defendants argued in the contract that they would "not sell to any firm, it state, or person, in Canada, any style so much N. S. Bathurse & Co. have placed on order, nor will they sell any current made similar to any style that they have sold N. S. Bathurse & Co." but they further agreed "not to sell or use to any firm, or store, or organization South of Toronto either on clothing covers," etc.

The defendants argued, as we mentioned the contract, not to sell any like or similar garments to plaintiffs competitors within the territorial limits specified in the contract. In view that is fixed in the contract which said the parties were required or permitted to comply with its terms.

The contract is validated; it does not require the performance of any promises made by the plaintiff. Under the terms it is made optional with the plaintiff whether is would enter any, and, if so, how many garments from the defendants. The contract expressly requires the

defendants to deliver to plaintiff such goods as it might order, but no means are indicated therein for determining the terms or prices for goods so ordered, either by reference to market values or otherwise. So far as the provisions of the contract may be said to be executory, it is so uncertain and indefinite in its terms as to be clearly unenforcible.

Plaintiff's statement of claim rests upon the terms and conditions imposed upon the parties to the action by this contract. Plaintiff seeks to compel the defendants to pay it damages for a breach of this contract. While there is much doubt, under the authorities, that damages resulting from an estimated or conjectured loss of future profits of a business, are recoverable in a legal action, even where the terms of a contract forming the basis of such action are not uncertain, there can be small doubt that the plaintiff here could not recover on its claim against the defendants, for the reason that its statement of claim failed to show that it had a legal right of action against the defendants for damages arising out of a breach of the contract.

Plaintiff cannot recover damages for its alleged loss of profits. There is much force, however, in the contention that the so-called contract should be regarded, insofar as it has been executed by the parties, as an offer by defendants to sell goods to the plaintiff on the terms indicated in the writing. To the extent that the parties have acted upon it and merchandise has been delivered to the plaintiff thereunder, the writing may be looked at for the purpose of determining the terms upon which such goods were in fact sold and delivered.

defendants is unique in plaintiff even though an 11 might exist, but no means are indicated therein for determining the issues by jurors for proof or disproof, either by reason to another value or otherwise. So far as the pleadings of the complaint may be said to be meaningless, it is as concrete, and indicative in its terms as to be clearly manifestible.

Plaintiff's statement of claim rests upon the terms and conditions imposed upon the operation in the action by this contract. Plaintiff seeks to compel the defendants to pay it damages for a breach of this contract. But - there is much doubt, under the authorities, that damages resulting from an anticipated or unjustified breach of future profits at a venture, can constitute in a legal action, even where the terms of a contract indicate the basis of such action are not uncertain. Indeed one be small doubt that the plaintiff here could not recover on the claim against the defendants, for the reason that the evidence of claim failed to show that it had a legal right of action against the defendants for damages arising out of a breach of the contract.

Plaintiff cannot recover damages for its alleged loss of profits. There is much first, however, in the contention that the so-called contract would be repudiated, inasmuch as it has been executed by the parties. No effort by defendants to sell yield to the plaintiff on the terms indicated in the writing. It the extent that the parties have acted upon it and performance has been delivered to the plaintiff - however, the writing may be treated as for the purpose of determining the terms upon which such yield was to that yield was delivered.

The theory of the plaintiff's defense to the counter-claim, as shown by the affidavit of merits filed thereto, is, that the defendants had violated the conditions and terms of the sale under which the garments were delivered to the plaintiff. But the plaintiff does not seek to recover an "allowance of $2.00 net on each garment of every style" delivered to plaintiff, as set forth in the writing which plaintiff insists constitutes the contract. The contention of the plaintiff is that the defendants had sold to plaintiff's competitors certain garments, the patterns and styles of which were originated by the plaintiff and delivered by it to the defendants, which conduct on the part of the defendants constituted a breach of the alleged contract, and that as a result of such conduct on the part of the defendants the plaintiff is entitled to recover - not the $2.00 allowance referred to in the writing, but a sum in excess of this amount by way of general damages resulting from a loss of profits. This contention of plaintiff cannot be allowed.

The affidavit of merits filed by the plaintiff to defendants' counter-claim set forth the substance of the contract in question. It admitted the receipt by it of the merchandise which the defendants alleged in their counter-claim had been delivered to it, but it asserted that it was entitled to a 10% discount on such prices and that the prices actually agreed to by the plaintiff and the defendants for the merchandise in question was 10% less than the amount set forth in Exhibit "A" attached to the counter-claim. The affidavit of merits showed a defense to at least 10% of the amount claimed by the defendants to be due from the plaintiff. If the fact is as alleged in the affidavit of merits, then the judgment in favor of the defendants is

the theory of the plaintiff's defense is the counter-claim, as shown by the affidavit of service filed therein, i.e., that the defendants had violated the conditions and terms of the sale under which the premises were delivered to the plaintiff. Yet the plaintiff does not seek to recover an "allowance of $3,00 per day for breach of every night" delivered to plaintiff, as set forth in the writing which plaintiff insists constitutes the contract. The evidence tends of the plaintiff is that the defendants had sold to plaintiff's competitors certain merchandise, the patterns and styles of which were originated by the plaintiff and delivered by it to the defendants, which conduct on the part of the defendants constituted a breach of the filing contract, and that as a result of such conduct on the part of the defendants the plaintiff is entitled to recover - not the $3,00 allowance referred to in the writing, but a sum in excess of this amount by way of general damages resulting from a loss of profits. This construction of plaintiff cannot be allowed.

The affidavit of service filed by the plaintiff to defendants' counterclaim set forth the substance of the contract in question. It contained the recitals by it of the agreement which the defendants signed in their counter-claim and upon delivery to it, yet it asserted that it was assisted to a lot element on such prices and that the prices actually agreed to by the plaintiff and the defendants for the merchandise in question was $12 less than the amount set forth in Exhibit "A" attached to the counter-claim. The affidavit of service shows a failure to at least list of the amount claimed by the defendants to be due from the plaintiff. If the fact is as alleged in the affidavit of service, then the judgment in fact of the defendants is

for too large a sum.

In its statement of claim the plaintiff alleged that on June 7, 1916, it elected to return 99 garments which had been sold and delivered to it by the defendants; that defendants refused to receive these garments and that defendants "still persist in such refusal;" that said garments were of a net value of $1,289.70, and that this sum should be credited to the plaintiff. These allegations are substantially repeated in the affidavit of merits filed by the plaintiff to defendants' statement of counter-claim.

It does not appear in plaintiff's statement of claim, nor in its affidavit of merits, that plaintiff at the time of trial had possession of the 99 garments in question. No allegation is made that the plaintiff is willing and able to make its tender good. For aught that appears the plaintiff at the time of the trial was unable to return the goods, and if such be the case, it would not be entitled to recover the amount of their net value. In this particular both the statement of claim and the affidavit of merits were defective.

The record discloses that the plaintiff's affidavit of merits was stricken from the files. It seems to present a valid defense to at least a part of the claim made by the defendants.

The judgment of the Municipal court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

for his injury a man.

In his statement of claim the plaintiff alleged that on June 7, 1918, it claimed to return 27 gunnies which had been sold and delivered to it by the defendants; that defendants refused to receive these gunnies and that defendants refused to pay plaintiff's petition in such refusal; that said gunnies were of a net value of $1,255.75, and that this sum should be credited by the plaintiff. These allegations are substantially repeated in the affidavit of merits filed by the plaintiff to defendants' petition of nonsuit-claim.

It here not appears in plaintiff's statement of claim, nor in its affidavit of merits, that plaintiff at the time of filing the petition of its 27 gunnies in question. No allegation is made that the plaintiff is willing and able to make its tender good. The sugar that appears the plaintiff at the time of the trial was ready to return the goods, and if made by the time, it would not be entitled to receive the amount of their net value. In this situation what the statement of claim and the affidavit of merits were defective.

The trial discloses that the plaintiff's affidavit of merits was stricken from the files. It seems to present a fully defense if it had a part of the claim made by the defendants.

The judgment of the lower court will be reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

314 - 23280

208 I.A. 304

JACOB KAMINSKY,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE DENEEN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court in favor of the plaintiff, Jacob Kaminsky, and against the defendant, Chicago Railways Company, for the sum of $15,000. The suit has been tried three times in the Superior court. The first trial resulted in a verdict in favor of the plaintiff, which verdict was set aside and a new trial ordered. On a second trial the jury disagreed and on a third trial a verdict and judgment thereon was entered, from which this appeal is taken.

The declaration, consisting of five counts, charged in various forms that the plaintiff was injured by and through the negligent operation of a street car in the possession of the defendant. The plaintiff was employed by the defendant as a car cleaner at its Lawndale barn. It was stipulated on the trial -

"That the car barn and the property connected with the car barn is located at approximately 22nd street and Ogden avenue; that the barn occupies the south side of 22nd street, faces north, and occupies a space east and west of approximately 200 feet; that the barn extends south from 22nd street a distance of 150 to 200 feet; that in the rear of this barn to the south is a yard extending from 250 to 300 feet north and south; that connecting with the car barn and on the west side of the yard is a fence that extends to the south end of the company's property; that there is a fence across the south end of the company's property and a fence on the east side of the company's property enclosing the entire yard, except on the north. The barn occupies the entire north front of the property with the exception of a space on the east side of the barn between the barn and the fence, from 20 to 25 feet wide. Coming off of the two main tracks on 22nd street are switches that lead into the different portions of the car barn; each one of

these spaces so connected by a track coming into the barn being called a bay. There are six or seven of these bays. That there is a main track coming into each one of these bays that extends from 22nd street through to the rear of the yard and the rear of the barn in question, extending all the way from the entrance of the barn to the fence; that between the first main track to the east and the fence on the east side of the company's property and immediately next to the fence, is a track known as the 'sun dry' track. The track next to the fence will be called the 'sun dried' sand dry, or 'sun dry' track and the track coming into the east bay and coming through to the fence will be referred to as 'main track number 1'; the east wall of the barn separates main track number 1 from the sun dried track. There is a space of about 25 feet between the east wall of the car barn and the east fence; main track number 1 is in the barn. The sun dry track run on the north to 22nd street. Connecting main track number one and the sun dry track is a crossover or switch, beginning about two car lengths south of the barn on main track number one and going across, connecting with the sun dry track. North of that crossover there are two other tracks between the sun dried track and the barn, and south of the crossover there are no tracks between the sun dried tr ck and main track number one. At the point where the crossover connecting the sun dried track and main track number one, left main track number one, there was also a track left the west side of main track number one and ran parallel with it probably four feet from it to the south end of the barn. Within the barn and under each one of the main tracks there was a pit for the purpose of permitting employes to work under the cars."

The evidence heard on the trial tends to show that the plaintiff came to this country from Europe in the year 1906; that since that time his only employment had been with the defendant company; that it was his custom during the time of his employment to go to work at 7 o'clock in the evening and to quit work at 6 o'clock in the morning; that during the time of his employment for defendant he was engaged as a car cleaner under the direct supervision of J. A. Schultz. The accident occurred on August 14, 1909. The men employed in car cleaning in the yard at the Lawndale barn usually worked in pairs. At and before the time of the accident several men, other than the car cleaners, were employed at the car barn as car repairers.

Plaintiff testified that on the night of the accident he went to work at 7 o'clock; that he was directed by Schultz to clean the windows of cars standing upon the

[illegible]

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tracks in the yard; that plaintiff and his partner were engaged in this work for about one-half hour, when, it beginning to rain, Schultz ordered them "to close up the windows"; that plaintiff left the step ladder upon which he was working and went with his partner to close the car windows; that he first closed the windows in a car which was standing on the "sun dry" track, being the car upon which they were working when Schultz ordered them to close the windows; that it was dark and raining at the time and that there was no light in the cars; that it took plaintiff and his partner more than one-half hour to close the windows on the two cars which were standing on the "sun dry" track; that after the windows in the two cars were closed he started to go to the main track to close the windows in five cars standing thereon; that he looked south and west on the main track, which was west of the "sun dry" track (referred to in the stipulation as "main track number 1"); that he attempted to cross between the second and third cars from the south end of the main track.

Plaintiff testified also that at the time he started to cross the main track he looked north and that he saw that there was a space on the main track, at the south end of the barn for about two cars; that the five cars on the main track were stationary and unlighted; that the ends of the cars between which the plaintiff attempted to pass were about 18 inches to 2 feet apart; that he attempted to enter one of the cars on the main track at the side nearest the "sun dry" track, where he had been working, but found that the door was locked on the inside. He then attempted to pass between this car and the one next to it when the cars north of the place where he then was were suddenly bumped, and he sustained thereby the injuries for which he brings his action.

The different repair men employed in and about

the barn were in the main given special lines of repair work to perform. The car cleaning work was generally performed in the yard, while the repair work was usually done in the barn. The plaintiff testified that he never moved any cars while in the employ of the defendant. His testimony is corroborated by other witnesses, while witnesses for the defendant testified that they had seen plaintiff moving the cars.

On the night of the accident, which occurred about eight o'clock, a heavy rainfall had so disabled the motors of several of the cars in the barn and yard that they could not be moved on their own power; these cars were known as "dead" cars, and this condition was somewhat unusual. There is evidence to the effect that the cleaners sometimes moved the "dead" cars, but that other cars, with uninjured motors, were always moved in and out of the barn to the yard by the repair men; that it was customary for the persons in charge of moving such cars to give a warning of their approach in the yard by ringing a bell, and that prior to the time of the accident it was the practice to move the cars one at a time; that in cases where it was necessary to move cars with "dead" motors out of the barn, it was customary "to have a man with a lantern out there to take care of the front."

The evidence discloses that one Strataki, a car repairer, and who, so far as the evidence shows, was in no way associated with the plaintiff in the work of car cleaning, operated a live motor car in such a manner as to propel in front of it two "dead" cars out of the barn and against the five cars which were standing on the main track. The force of the impact was such as to cause the two cars between which plaintiff was moving to come together and cause his injuries.

The evidence heard upon the trial was voluminous

and in many respects it is contradictory. There is a dispute in the evidence as to whether the yard was sufficiently lighted at the time of the accident. There is some evidence that the car repairers were directed in their work by a foreman who had nothing to do with the work of the car cleaners. There is also evidence in the record which tends to sustain the contention of the plaintiff that it was usual and customary for the car cleaners in doing their work in the yard to pass between cars standing upon the tracks.

The plaintiff sustained, as a result of the accident, severe crushing injuries to the right leg, which necessitated its amputation two or three inches below the knee cap. Nineteen months after the accident he was able to use an artificial limb. Before and at the time of the accident he was earning $14.00 a week; he testified that his earnings since the accident have been from 40 cents to 60 cents a day; that there is a cut in the stump of the leg which opens up when he uses the artificial limb for a considerable length of time; that he is on such occasions required to use crutches for some days and until the cut heals again.

It is urged on behalf of the defendant that the evidence heard upon the trial does not tend to prove that the defendant was guilty of any negligence which contributed to cause the accident in question.

Evidence was submitted on the trial which tends to show that the plaintiff was ordered, just before the time of the accident, to close the windows of the cars standing on the tracks near the place where he was employed. In obedience to this order he was required to go to the cars standing upon the different tracks. There is some evidence in the record that the yard was not well lighted and that the

and in many respects it is unfortunately. There is a science in the attempts to imitate the just and artificially flexible of the life of the machine. There is some evidence that the separtness even displayed is first step of a feeling the and nothing or in view the work of the man elsewhere. There is also evidence in this review which illustrate the question of machine and characteristics of the plasticity that it was going not instinctly for the man elsewhere is after that work is the point to speak natural more standing upon the human.

The plasticity mechanical, as a result of the establishment, means creating imperfect in the other hand. This commercialized the mechanistic man to trade labour below the base say. Elsewhere machine effect the machines to the idea of artificial limb. Perfect not as the life of the machines or the machine life, it a world; be substitute that the machine alone the machines have been from a; means to at means a more than there is a not or the group of the the this speak or man be made the artificial also the a some mechanic length of least that be is or man mechanism the point to use machine the more more and world the not made work.

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Science was machine or the that which human to stop that the plasticity man artificial, just further the time of the machine, to close the change of the work function or the drawn when the first when to man machines. In machine to this other to man replaces to as it the work standing upon the different machine. There is some relation

method employed to move the two "dead" cars was unusual. The defendant, by its proper officers, knew that the car cleaners were working in the yard at the time Stratski moved the cars out on to the main track. It seems to be admitted on the record that no warning was given of the approach of these cars to the string of cars between two of which the plaintiff was passing, although some of the witnesses say a custom prevailed in the yard of giving a warning to persons working therein of the approach of cars on the tracks.

Under all the circumstances shown by the evidence, the question of the defendant's negligence was one of fact for the jury. In deciding the case of L. S. & M. S. R. R. Co. v. Hundt, 140 Ill. 525, the court said:

> "The only inquiry is, did the proof tend to prove negligence, and we have no hesitation in saying that putting in motion a car, where men are known to be, or where it is known they may be, passing, without a brakeman upon it, and without any other means of controlling its momentum, has a tendency to prove negligence."

The facts in that case are not similar to those in the instant case, but the principle involved is the same.

It was the duty of the defendant to use every reasonable precaution to protect the men working in and about the cars in the yard. The accident occurred at night, and if the testimony of some of the witnesses, that the light in the yard was poor, that the cars were unlighted, and that no warning of the approach of these cars on the main track was given, notwithstanding a custom to give such warning prevailed in the yard, is true, then there was evidence admitted on the trial which tended to prove that the defendant was in fact guilty of negligence.

It is also contended that the plaintiff was guilty of contributory negligence which proximately contributed to cause the injuries which he received. The evidence tends

to show that the plaintiff was ordered to close the windows in the cars standing upon the main track. There is some dispute in the evidence as to just what windows had been closed in the cars on the main track before the accident occurred. There was evidence submitted from which the jury could conclude that the plaintiff was directed to close the windows in the cars on the main track; that in attempting to do so he tried to gain entrance to a car from its east side; that on finding the doors on that side locked he attempted to pass between two of the cars so as to get upon the car from its west side.

In this connection it is urged that the plaintiff could have gone around either the north or the south end of the string of cars to the west side of the main track; or that he could have in other ways acted with greater care to protect himself. It is not clear from the evidence that under the circumstances which existed the plaintiff would have been entirely free of danger had he gone to the west side of the track by passing around the north or south end of the five cars, but however this may be, we think the jury had the right to determine under the evidence whether the plaintiff adopted a negligent way to enter the car to do the work he was ordered to perform by his foreman.

In C. & N. W. Ry. Co. v. Kane, 70 Ill. App. 676, at page 679, the court says:

> "It is true, no doubt, that had appellee looked for moving cars a few seconds before he was hurt, he would have escaped injury, but he says that he did look before he went onto the track and saw that it was clear, and being engaged in his work, more time elapsed after he looked than he thought; also it appears that a man was at times placed on moving cars. It was a question of fact whether, under all surrounding circumstances, appellee was exercising the care that an ordinarily prudent and careful man would have done. This is a question on which reasonable, fair-minded men may fairly arrive at different conclusions, and was properly submitted to the jury."

In I. C. R. R. Co. v. Ianchiange, 277 Ill. 170, at page 176, it is said:

> "It was a question of convenience with plaintiff, in reaching the east side of his car, whether he should pass under the car or go around it either to the right or left. To have gone south he would have had to go a distance of eight carlengths and back, crossing the culvert or subway. Even by so doing he would not have entirely escaped danger if the cars were subject to be suddenly moved, without notice to him; or if, as contended by defendant, the cars were not coupled together and he could have passed through between them, he would nevertheless have thereby exposed himself to danger. We think, however, the ground upon which he should not be held guilty of negligence as a matter of law is the fact that he had reasonable ground to believe the car in which he lived would not be disturbed without timely warning to him. The facts and circumstances in evidence before the jury justified the finding that he was at the time in the exercise of ordinary care."

The testimony of one witness, a car cleaner, is to the effect that the plaintiff stopped at the place where he was injured and talked to the witness two or three minutes, and it is insisted that this testimony shows that the plaintiff was guilty of contributory negligence in that he was not crossing the tracks for the purpose of performing his work, but was standing between the cars and talking to this witness. The testimony of this witness is denied by that of other witnesses.

It is true, as urged, that under the circumstances which surrounded plaintiff before and at the time he received his injuries, he was called upon to exercise a degree of care commensurate with the character of the work he was performing and the environment in which he was placed. Just before he was injured he was called upon to act promptly in closing the windows of the cars because of the approaching rainstorm. Having finished his work on the "sun dry" track he went to the main track to close the windows in the cars standing on that track. If it be true, as contended, that a custom existed in the yard which permitted the men in doing

their work to pass between cars standing on the tracks, then we are not willing to say that the plaintiff was guilty, as a matter of law, of contributory negligence in passing between the two cars at the time he received his injuries. The law does not require a person to do any particular thing to avoid injuries from accidents. The law required the plaintiff here to exercise the care that a reasonably prudent person would have exercised under the circumstances which surrounded him at the time he received his injuries, and in this case whether the plaintiff did exercise such care was a question of fact for the jury.

It is also urged that the plaintiff and Stratski, the car repairer, were fellow servants. Counsel for defendant have argued this question with great force and have aided the court by a resume' of the decisions which deal with the principles of the fellow-servant rule as applied in decisions in the Illinois courts. It is contended by counsel that the master is required by the law to keep the place in which a servant is employed in a reasonably safe condition, and that this legal duty is nondeligable; but where an injury to a servant is caused by the operation of the business or work carried on in a place, which is otherwise reasonably safe, that the master will not be held liable upon the theory that he had violated his duty to keep such place in a reasonably safe condition.

In C. & N. W. Ry. Co. v. Moranda, 93 Ill. 302, the Supreme court considered at length the prior decisions of that court which dealt with the fellow-servant rule, and it there held that the decisions of the courts of the other States and of the English courts were not in all respects in harmony with the decisions of the courts of this State. At the suggestion of counsel we have examined the Moranda case,

[illegible] work to pass between such standing on the issues, that we are not willing to say that the plaintiff was guilty, as a matter of law, of contributory negligence in unduly entering the two cars at the time he received his injuries. The law does not require a person to, in any particular thing, be avoid injuries from accidents. The law requires the plaintiff here to establish the mere fact a reasonably prudent person would have exercised under the circumstances which surrounded him at the time he received his injuries, and if, in this case whether the plaintiff did exercise such care was a question of fact for the jury.

It is also urged that the plaintiff and witness, the car inspector, were failing witnesses. Counsel for defendant have argued this question with great force and have cited the court to a number of the decisions which deal with the principles of the failing-witness rule as applied in decisions in the Illinois courts. It is conceded by counsel that the witness is required by the law to keep the place to which a witness is required by the law to keep the place to which a witness is subpoenaed in a reasonable well condition, and that this legal duty is mandatory; but there is failed to a witness is excused by the negligence of the business of such service on in a place, which is otherwise reasonably safe, that the witness will not be held liable upon the ground that he had violated his duty to keep such place in a reasonably safe condition.

In C. & E. I. R. R. Co. v. Hildebrand, 47 Ill. 228, the defendant sought exclusion as lawful the rule contained in that court which stated that the failing-witness rule, and it there held that the decisions of the courts of the states of the Union and of the English courts were not in all respects in harmony with the decisions of the courts of this state. As the application of counsel we have examined the various cases.

supra, and are not convinced that it enunciates a rule which would, when applied to the facts of the instant case, render Strataki a fellow-servant of the plaintiff so as to relieve the defendant of legal responsibility for the injuries which the plaintiff sustained.

It is said in the Moranda case that in cases wherein the right of action has been denied upon the ground that the injured servant and the offending servant were fellow-servants, the facts show that they were both in consociation by their ordinary duties, or that at the time of the injury they were actually co-operating in the same particular work; and the theory of the case seems to be that -

> "If the court has constantly had an eye to casting the hazard on those who have the best means of preventing wrong, it is thought the exemption (of the master) would have been applied to cases where the co-servants occupy such position in relation to each other as to suggest that they could, in some way, contribute towards guarding against the danger to be apprehended."

The question to be determined from the evidence here is whether the plaintiff and Strataki, in the performance of their duties for the common employer, were brought into such association as that each might have exercised an influence upon the other promotive of proper caution. The evidence discloses that the plaintiff had worked for defendant as a car cleaner for about two and one-half years before he was injured; that Strataki, the man who operated the car which propelled the unlighted cars on the main track, was a car repairer. Plaintiff was employed to scrub cars and to wash windows therein, while Strataki's work was said to be that of repairing defective brakes, and the evidence tends to prove that this class of repair work was all done in the pit. Defendant's foreman, Schultz, testified that "Each repairer had a special field of work on a car; one man worked on the brakes, one on the controller, one on the

lights", etc.; that "as an ordinary thing the only time the car repairers and the car cleaners ever got close to each other was when they were in the barn. When I say they worked together on the same car, I mean that sometimes when a car cleaner was scrubbing out a car or cleaning the windows some of these car repairers might be underneath looking at the brakes; that is as much as they worked together." The evidence tends to prove that the car repairers never aided the car cleaners in their work, nor that the cleaners at any time assisted the repairers.

It is our opinion that the evidence heard on the trial was not of such character as would permit us to say as a matter of law that Stratski and the plaintiff were fellow-servants; they were not employed in the same line of work. While it is true that the work which each was employed to perform brought them at times "close to each other," they do not seem at any time to have had any such relationship toward each other as would permit either to exercise any control over the other which would be promotive of their common safety; they were not, insofar as the evidence discloses, at any time co-operating toward a particular end. The work of one class of employees was to clean the cars; the work of the other was to keep the cars in repair. There is some evidence that each class of employees was directed by a different foreman. Witnesses testified that the car cleaners were under the direction of one Druly. The most that can be said, on the evidence, is that at times the two classes of employees were working at or near the same place, but we think the jury could conclude from the evidence that in general the car cleaning was done in the yard, while the repair work was generally, but not

limit", etc.; that "as an evidence that we may live the our involuntary and has not discovered every yet given to man either was man ever born in the body. Then, I am sure neither together on the same ear, I mean that something when a car disaster was surprising and a car or disaster the minimum mode of time our injuries might be underwords limited at the lesson; that is as much as they varied injuries." The evidence tends to prove that the car injuries never added the car disaster in their work, nor then the elements of any time material the injuries.

It is our opinion that the evidence stand on the issue was not of such importance as would permit us to act as a matter of law that disaster and the plaintiff were relative-strangers; that also not mentioned in his own line of work. While it is true that the work which was engaged to perform brought them at times "close to each other," they do not seem at any time to have had any relationship beyond that which existed between co-workers. The work of the plaintiff was to operate any machine over the ditch which was to be dug by the plaintiff. In the evidence, we may take cognizance that at times the plaintiff was in the ditch, and at the time of the disaster was in the trench. There is some evidence that such place of injuries was directed by a skilled foreman. Witnesses testified that the car disaster was under the direction of the Smith. The work that was to be done, on the evidence, is that of clean the two lateral of sewerage pipe resting on or near the side alone, but we think the jury would consider that the evidence that is general the car disaster was done in the ditch, while the regular work was generally, but not

always, performed in the barn.

In McCoy v. C. & A. R. R. Co., 268 Ill. 244, the plaintiff was employed by the defendant as foreman of an extra switching crew. It was insisted in that case that the injuries which an employee had sustained were caused by the negligence of fellow-servants. The evidence there showed that members of another switching crew employed in the switch yard of the defendant, placed a car upon a track in the yard in such position that the plaintiff, who was riding on the rear end of a train operated by his crew, struck the car and he was injured thereby. The Supreme court, assuming in its decision that the injury to plaintiff might have been caused in part by the negligence of members of his crew, who were clearly his fellow-servants, further held that -

> "Such negligence, if any, was not, however, the sole cause of the injury, but merely concurred with the negligence of the members of the shop yard crew in placing the car at the north end of the *** track***. It cannot be successfully contended that defendant in error was directly co-operating with the members of the shop yard crew in the particular business in which he was engaged at the time he was injured; nor does it appear as a matter of law, from the facts appearing in the record, that the usual duties of defendant in error and the members of the shop yard crew brought them into habitual association so that they might exercise a mutual influence upon each other promotive of proper caution. Whether the members of the shop yards crew and defendant in error were fellow-servants was therefore a question which the court properly submitted to the jury for determination."

The evidence tended to prove that the defendant failed to comply with a custom to give warning by the ringing of a bell of the movement of cars on the main track. Where an employer has established a custom of giving warning of the approach of danger to such extent as that an employee is authorized to rely upon compliance with such custom, the continual performance of the duties imposed thereby are non-assignable; where the employer

clearly, performed in the town.

In [illegible] v. [illegible], [illegible] 121, 122, the plaintiff was employed by the defendant as driver of an omnibus plying over. It was insisted on that when that the injuries which he sustained were caused by the negligence of fellow-servants. The evidence were caused that members of another contracting firm employed in the making good of the defendant, jumped a car upon a track in the road in such position that the plaintiff, who was sitting on the rear end of a truck operated by his owner, turned the car and he was injured thereby. The Supreme court, commenting in its decision that the injury to plaintiff might have been caused in part by the negligence of members of his own, was more clearly the fellow-servants, further held that -

"Upon principle, if not, we say, however, the mere common of the injury, the mere commission with the negligence of the servants of the same joint employer is sufficient to make the master liable. It is manifestly contended that defendants in error are liable for the negligence of the members of the same joint employer in the particular instance in which he was engaged at the time in the employment, but that it depends on a matter of law, from the facts appearing in the record, that the common duties of defendants in error and the members of the same joint employer were such that the negligence of the latter cannot be held to be the negligence of defendants in error. Whether the members of the same joint employer were engaged in the same duties, or in other words, whether they were fellow-servants, is a question which the court properly submitted to the jury for determination."

The evidence tended to prove that the defendant failed to comply with a request to give warning by the placing of a bell or the sounding of horn on the main track. There on employee has established a custom of giving warning of the approach of danger to such direct as that an employee is authorized to rely upon compliance with such custom, the existence of the custom imposes instead upon the non-compliance with the employer

imposes the performance of such duties upon an employee, such employee with respect thereto must be held to occupy the position of a vice-principal.

In Denk Bros. Coal Co. v. Thil, 228 Ill. 234, the Supreme court said:

> "In such cases the test whether the individuals concerned were fellow-servants is not found in the fact that they were engaged in a common employment under the same general contract and paid by the same principal, but is whether the negligent servant, in the act or omission complained of, was by the direction or consent of the master under the law performing some duty which the master personally owed to the servant."

It is insisted that the court erred in refusing to give plaintiff instruction No. 1. Following the refusal to give this instruction the defendant tendered to the court instruction No. 26, which was given to the jury.

Paragraph 1 of instruction No. 1 was to the effect that the plaintiff was required to prove by a preponderance of the evidence that the defendant ran and operated the cars the movement of which caused the accident. This was not a disputed fact on the trial. The substance of paragraph 2 is contained in instruction No. 29, given to the jury at the request of the defendant. Paragraph 3 of instruction No. 1 in effect informed the jury that the plaintiff could not recover at all unless he established by a preponderance of evidence that the employee of defendant failed in operating the cars to sound a bell, etc. The declaration filed by the plaintiff charged negligence against the defendant in other particulars than that of a failure to give warning. Under the declaration recovery might be had aside from this issue; but in any event the instruction was erroneous in that it confined the duty of giving warning to the employee who operated the cars in question. When consideration is given to all of instruction No. 1, we think

impose the performance of such duties upon an employee. Such employee with impaired hearing may be held to accept the position of a risk-taking.

In *Chicago Great. West. Ry. v. Jelk*, 216 Ill. 494, the Supreme Court said:

> "In such cases the fact that defendant the individuals mentioned were fellow-servants is not found in the fact that they were engaged in a common employment under the same general business and yet in the same principal, but in whether the employment extends, in the mere or minutiae functions of, and in the direction or control of the master rather the law intervening some only which the master personally owed to the servant."

It is learned that the court erred in refusing to give plaintiff instruction No. 3. Believing the refusal to give this instruction the defendant insisted to the court instruction No. 20, which was given to the jury.

Paragraph 1 of instruction No. 3 was to the effect that the plaintiff was required to prove by a preponderance of the evidence that the defendant was operating the cars the moment of which causes the accident. This was not a disputed fact in the trial. The evidence of paragraph 2 is contained in instruction No. 20, given to the jury at the request of the defendant. Paragraph 3 of instruction No. 3 is after informed the jury that the plaintiff could not recover if it should be established by a preponderance of evidence that the employee of defendant failed in operating the car to sound a bell, etc. The instruction filed by the plaintiff charged negligence against the defendant in other particulars than that of a failure to give warning. Under the instruction requested right in and with from this issue; but in any event the instruction was erroneous in that it confined the duty of giving warning to the employee who operated the car in question. Under instruction is given in all of instruction No. 3, we think

the court was right in refusing to give it to the jury. Certain propositions of law laid down therein were correctly stated, and if disconnected from certain erroneous propositions should have been given. Other propositions in this instruction were erroneous, and still others while correctly stating the law were given in other instructions. Other questions are raised in connection with the giving and refusing to give certain instructions, as to which we do not think the court committed reversible error.

The verdict of the jury was for the sum of $15,000, and it is complained that this sum is excessive. The extent of the plaintiff's injuries is hereinbefore indicated. There can be small doubt that as a result of the injuries the plaintiff has suffered much pain and he testified that his leg still causes him much annoyance. Counsel for plaintiff have called our attention to many cases which tend to support their contention that the verdict is not excessive. It cannot be held that the verdict in plaintiff's favor was so large as to indicate that the jury were actuated by passion or prejudice in rendering such verdict.

The judgment of the Superior court will be affirmed.

AFFIRMED.

the court was right in refusing to give it to the jury. Certain particulars of law held down therein were erroneous stated, and it eliminated from certain arrangements which should have been given. Their propositions in this instruction were erroneous, and still others which were unnecessarily adding the law were given in other instructions. Their questions are raised in propositions viii the giving and refusing to give certain instructions, so it makes no difference the court committed several errors.

The evidence of the jury was for the use of $10,000, and it is contended that this was not excessive. The nature of the plaintiff's injuries is described in the opinion. There was be small doubt that as a result of the injuries the plaintiff has suffered such pain that he testified that his leg still causes him much inconvenience. Counsel for plaintiff have failed and authorities to show cause which have to account their contrariwise that the evidence is not excessive. It seems to have that the verdict in plaintiff's favor was so large as to be evidence that the jury were actuated by passion or prejudice in rendering such verdict.

The judgment of the Supreme Court will be affirmed.

AFFIRMED.

317 - 23283

LILLIAN M. SAZIER,
Appellee,

vs.

PHILLIP STATE BANK OF CHICAGO,
a corporation,
Appellant.

208 I.A. 307

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Phillip State Bank of Chicago, from a judgment of the Municipal Court of Chicago in favor of Lillian M. Sazier, plaintiff, for the sum of $3,732.29. Suit was brought by the plaintiff to recover a balance which she claims was due her out of the proceeds of a sale of certain real estate in Cook County.

The evidence heard on the trial shows that the plaintiff and her husband, M. M. Sazier, for a considerable time had had business relations with the defendant and its predecessor. On November 16, 1915, the plaintiff agreed to sell to DeForrest A. Matteson the real estate referred to, for the sum of $20,000. Prior to the execution of this contract Matteson and the defendant entered into an agreement under which defendant agreed to take Matteson's note for a loan of $15,000, to be secured by a mortgage on the premises, which Matteson, on November 16, 1915, had agreed to purchase of the plaintiff for cash. The plaintiff was not a party to this agreement between Matteson and defendant. The sale of the real estate to Matteson was closed on December 16, 1915, at the office of Henry D. Irwin, who was attorney for, and Vice President and a director of the defendant bank. A few days before this deal was closed the plaintiff by letter directed defendant to receive the purchase price for her real estate from Matteson and to give her a statement of certain

[illegible] v. Thomas.

Appeals.

No.

Opinion filed June 22 [illegible].

A judgment.

Appellant.

Mr. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant, Illinois Glass Co. of Chicago, from a judgment of the municipal court of Chicago in favor of plaintiff in the sum of $1,000.00. Only the question of the liability of the defendant is involved, which was brought to the attention of the court by a motion of defendant that arrests in this cause.

The evidence shows that the total gross sum due plaintiff for the year 1918, i. e. Thirty, for a considerable time was not ascertained. In October 1918, the plaintiff agreed to sell to defendant 3, Gallons for that price reducing it, for the year of 1919. Prior to the commencement of this suit, plaintiff, for the defendant, supplied to defendant's wife for a term of 1919. It is admitted by a stipulation in the pleadings, which follows, on December 19, 1919, the amount to purchase of the plaintiff for year. The plaintiff was not a party to said agreement between defendant and defendant. The sale of the said goods which is following was signed on December 19, 1919, at the office of Henry C. Lewis, who was attorney for, and Thos Freeling and a director of the defendant Co. A few days before this suit was filed the plaintiff by letter directed defendant to withdraw the execution order for her rent which the landlord had to give her a statement of matters

items of indebtedness to be paid out of the sum so received, and to hold the balance subject to her order. After the receipt of this letter and the receipt of the purchase price of the real estate, the defendant delivered a statement to the plaintiff from which it appeared there was a balance due from the defendant to the plaintiff of $2,057.89. The statement is too lengthy to include in this opinion. It is insisted on behalf of the plaintiff that in the statement furnished her by the defendant she was improperly and illegally charged with the four items following:

Demand note dated	August 7, 1915,	$ 274.92	
" " "	June 1, 1915,	412.80	
" " "	August 9, 1915,	102.07	
" " "	April 1, 1913,	2,742.50	$3,532.29

In addition to the above four items, plaintiff insists that there is due her from defendant an additional sum of $200, being the amount of a check which was drawn by her husband, M. H. Cazier, paid by the bank and charged to the account of plaintiff, without her authority.

The evidence heard on the trial was in some respects contradictory; it will not be possible to indicate all of it here. The indebtedness which was paid by the defendant out of the sum delivered to it by the purchaser of the property consisted of certain notes, with accrued interest thereon, which were secured by mortgages on the premises in question. As to these payments no question is raised by the plaintiff. The four notes above referred to were executed by plaintiff's husband at different times, and we are unable to find in the evidence any sufficient legal reason for requiring the plaintiff to pay these notes.

It is urged on behalf of the defendant that the four notes in question were secured by certain trust deeds

which were executed by the plaintiff and her husband. The evidence on this question we think preponderates in favor of the contention of the plaintiff that these mortgages were given for the purpose of refunding certain prior mortgages. To this effect is the direct testimony of the plaintiff and her testimony in this particular is corroborated by that of a disinterested witness as well as by the conduct of the defendant itself.

The four notes in question were executed by plaintiff's husband and delivered to the bank. The earliest of these notes was dated April 1, 1913, and was for the sum of $2,500. Later notes were delivered to the defendant, the latest of which was dated August 9, 1915. That these notes were not to be included in the sum, the payment of which was secured by the mortgages, is shown by the correspondence between defendant and plaintiff's husband. On January 4, 1915, it wrote him with reference to the note dated April 1, 1913, as follows:

> "The account must be put in some better shape for the reason, as you know, Mr. Phillip is organizing a state bank and the collateral that is turned over to this bank must be in such shape that it will pass inspection of the state auditor."

This and other letters of like tenor and effect show that the defendant did not, with reference to at least a large part of the sum which was charged to the account of plaintiff, regard such sum as being included in the amount due under the mortgages. She did not sign or endorse any of the notes in question. The President of the defendant bank stated that it was not customary with him to apply the funds of a wife to the payment of the debts of her husband unless specifically authorized so to do by her. We think the evidence shows that no such specific direction was given defendant by the plain-

which were executed by the plaintiff and her husband. The evidence on this question we think preponderates in favor of the contention of the plaintiff that these mortgages were given for the purpose of refunding certain prior mortgages. To this effect is the direct testimony of the plaintiff and her testimony in this particular is corroborated by that of a disinterested witness as well as by the conduct of the defendant itself.

The four notes in question were executed by plaintiff's husband and delivered to the bank. The earliest of these notes was dated April 1, 1913, and was for the sum of $2,500. Later notes were delivered to the defendant, the latest of which was dated August 9, 1915. That these notes were not to be included in the sum, the payment of which was secured by the mortgages, is shown by the correspondence between defendant and plaintiff's husband. On January 4, 1915, it wrote him with reference to the note dated April 1, 1913, as follows:

> "The account must be put in some better shape for the reason, as you know, Mr. Phillip is organizing a state bank and the collateral that is turned over to this bank must be in such shape that it will pass inspection of the state auditor."

This and other letters of like tenor and effect show that the defendant did not, with reference to at least a large part of the sum which was charged to the account of plaintiff, regard such sum as being included in the amount due under the mortgages. She did not sign or endorse any of the notes in question. The President of the defendant bank stated that it was not customary with him to apply the funds of a wife to the payment of the debts of her husband unless specifically authorized so to do by her. We think the evidence shows that no such specific direction was given defendant by the plain-

[illegible] is [illegible] to be paid out of the sum so realized, and to pay the balance subject to her order. After the re-[illegible] of this letter and the receipt of the [illegible] plans of the two wheels, the defendant delivered a statement to the plaintiff from which it appeared there was a balance due from the defendant to the plaintiff of $3,987.88. The state-ment is the inquiry to include in this question. It is insisted on behalf of the plaintiff that in the statement furnished by the defendant was improperly and illegally charged with the item items following:

Second main [illegible] August 1, 1912.			$ [illegible]
" " " June 1, 1911.			[illegible]
" " " August 8, 1911.			[illegible]
" " " April 1, 1911.			[illegible]
			$3,987.88

In addition to the above first items, plaintiff insists that there is due her from defendant on miscellaneous use of [illegible] during the season of a month which was [illegible] by the defendant, R. R. Jenkins, just by the time not charged in the account of plaintiff, without her knowledge.

The evidence bearing on the first item is more [illegible]; [illegible] it will not be required to [illegible] all of it here. The circumstances which the gave rise to the difference and of the was contested is it is the [illegible] of the inquiry concerning of certain notes, with [illegible] interest thereon, which were issued by defendant to the [illegible] in question. As to these [illegible] no question is raised by the plaintiff. The first notes [illegible] relative to [illegible] by plaintiff's [illegible] at different times, and on are [illegible] to find in the evidence any [illegible] [illegible] inquiring the plaintiff to pay these notes.

It is urged on behalf of the defendant that the first notes in question were [illegible] by [illegible] [illegible]

which were executed by the plaintiff and her husband. The evidence on this question we think preponderates in favor of the contention of the plaintiff that these mortgages were given for the purpose of refunding certain prior mortgages. To this effect is the direct testimony of the plaintiff and her testimony in this particular is corroborated by that of a disinterested witness as well as by the conduct of the defendant itself.

The four notes in question were executed by plaintiff's husband and delivered to the bank. The earliest of these notes was dated April 1, 1913, and was for the sum of $2,500. Later notes were delivered to the defendant, the latest of which was dated August 9, 1915. That these notes were not to be included in the sum, the payment of which was secured by the mortgages, is shown by the correspondence between defendant and plaintiff's husband. On January 4, 1915, it wrote him with reference to the note dated April 1, 1913, as follows:

> "The account must be put in some better shape for the reason, as you know, Mr. Phillip is organizing a state bank and the collateral that is turned over to this bank must be in such shape that it will pass inspection of the state auditor."

This and other letters of like tenor and effect show that the defendant did not, with reference to at least a large part of the sum which was charged to the account of plaintiff, regard such sum as being included in the amount due under the mortgages. She did not sign or endorse any of the notes in question. The President of the defendant bank stated that it was not customary with him to apply the funds of a wife to the payment of the debts of her husband unless specifically authorized so to do by her. We think the evidence shows that no such specific direction was given defendant by the plain-

which were presented by the plaintiff and the defendant. The evidence on this question was flatly contradictory in favor of the assertions of the plaintiff that these certificates were given for the purpose of defrauding certain price authorities. It also appears in the direct testimony of the plaintiff and her witness in this particular, is corroborated by that of a disinterested witness as well as by the conduct of the defendant itself.

The first matter in question was contested by plaintiff's witness and introduced in the case. The contract of these notes was dated April 2, 1919, and was for the sum of $2,000. Later notes were delivered in the defendant, the latter of which was dated August 2, 1919. These three notes were not to be delivered in the mon. The primary of which was secured by the mortgages, is shown by the correspondence between defendant and plaintiff's husband. On January 4, 1919, it appears the trial referees in the case dated April 1, 1919, as follows:

> "The account must be put in some better order for the results, as you know, so, justly to substitute a whole fund and the estimated that is turned over to this body must be in such shape that it will pass inspection of the state auditor."

This and other letters of this kind and effect show that the defendant did not, also referring to at least a large part of the sum which was charged in the account of plaintiff, stated such sum as being included in the amount due under the mortgage. She did not sign or authorize any of the notes in question. The President of the defendant bank tested that it was not necessary with him to apply the funds of a wife to the payment of the debts of her husband which plaintiff endeavored to do by her. He stated the evidence that the same specific direction was given defendant by the plain-

tiff in this case. The officers of the defendant bank knew that the title to the property which was sold to Matteson was in the plaintiff, and it is difficult to understand how an experienced banker would permit his bank to become a creditor of the plaintiff without some direct agreement with her which would furnish a protection to the bank.

It also appears in the evidence that the defendant bank on December 22, 1916, paid to plaintiff's husband, M. H. Cazier, out of the funds deposited to her credit, a check for $200. The check was signed by M. H. Cazier and above his signature was written in green ink, "Lillian H. Cazier, by M. H. C." The check was endorsed on the back, "M. H. Cazier." Some time prior to the presentation of this check for payment the plaintiff and her husband had a joint account in the defendant bank, upon which either of them was entitled to draw checks. This joint account was closed on August 6, 1915. The plaintiff denies that she either signed or authorized the signing of her name to the check. Under the circumstances shown to exist by the evidence, the defendant had no authority to charge the check to the account of the plaintiff.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

sift in this case. The officers of the defendant bank have that the title to the property which was paid to Jackson was in the plaintiff, and it is difficult to understand how an experienced banker would really risk being so beaten a swindler of the plaintiff without some clear agreement with the which would furnish a protection to the bank.

It also appears in the evidence that the defendant bank on December 22, 1919, paid to plaintiff's account, S. E. Cadiz, but of the funds credited to her credit, a check for $[illegible]. The check was signed by S. E. Cadiz and above its signature was written in green ink, "Julius E. Daniel, by S. E. C." The check was endorsed on the back, "S. E. Cadiz," then also prior to the presentation of this check for payment the plaintiff had her husband had a joint account in the defendant bank, upon which either of them was entitled to draw checks. This joint account was closed on August 6, 1920. The plaintiff denies that she ever signed or authorized the signing of her name to the check. Under the circumstances given to which by the evidence, the defendant bank had no authority to charge the check to the account of the plaintiff.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

374 - 23348

WILLIAM HANKE,
Appellee,

vs.

GEORGE C. KEECH,
Appellant.

203 I.A. 308

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court in favor of the plaintiff for the sum of $112.50.

The defendant was the owner of real estate in Michigan. His wife, desiring to purchase real estate adjoining that of her husband, on August 21, 1915, made an offer by telegram to the owner of the property, a Mrs. Foster, to purchase such real estate for the sum of $2,000. Upon receipt of a telegram accepting the offer, the defendant informed the plaintiff, William Hanke, a real estate agent, that his, defendant's, wife had purchased the Foster place.

Hanke testified that in a conversation with the defendant on August 31, 1915, he informed defendant that he had already sold the Foster place to a man named Barbec, and that he had in his possession at that time a commission of $100 on account of such sale; that Keech thereupon said to him "You give the money back to your man as I have got the place and I will pay you your commission. * * * I will give you the same thing as she would"; that the plaintiff informed the defendant that the Foster place was sold for $2,250, and that plaintiff's commission was to be $112.50; and that Keech said he would make that better, that he would give plaintiff $150. The evidence shows that the defendant thereupon delivered to plaintiff a paper, which is as follows:

WILLIE BANKS,
Appellee,

vs.

CHARLES C. STATE,
Appellant.

APPEAL FROM MULTNOMAH COUNTY
(Hon. [illegible]).

Mr. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court in favor of the plaintiff for the sum of $125.00.

The defendant was the owner of real estate in Portland. His wife, desiring to purchase real estate adjoining that of her husband, on August 21, 1924, made an offer by telegram to the owner of the property, a Mr. Parker, to purchase such real estate for the sum of $1,000. Upon receipt of a telegram accepting the offer, the defendant informed the plaintiff, Willie Banks, a real estate agent, that his defendant's wife had purchased the Parker place.

Banks testified that in a conversation with the defendant on August 21, 1924, he informed defendant that he had already sold the Parker place to a man named Jackson, and that he had in his possession at that time a contract of $125 in payment of such sale; that Frank Thompson said to his wife "You give the money back to your man as I have got the place and I will pay you your commission. [illegible] I will give you the same thing as the man;" that the plaintiff informed the defendant that the Parker place was sold for $1,000, but that plaintiff's commission was to be $125; and that Frank said he would make that better, that he would give plaintiff $150. The evidence shows that the defendant thereupon delivered to plaintiff a check, which is as follows:

"Union Pier, Mich. 8/21/15

Wm. Hankey,
Union Pier, Mich.
Dear Sir:-

Have arranged purchase of Foster cottage and have their acceptance of my offer by telegram dated 1:12 P. M. Aug. 21, 1915, at Billings Montana.

In consideration of the transaction I will protect you to the extent of any commission you had arranged with Mrs Foster to receive from her.

Yours truly,
George C. Keech."

The evidence shows that following this conversation Mrs. Foster refused to deliver the property to the defendant or his wife for $2,000; that she insisted she would not sell the place for less than $2,250, that being the amount which the plaintiff had been offered for the place by the prospective purchaser, Barbec. It is insisted on behalf of the defendant that Hanke informed Mrs. Foster that he, Hanke, had sold the place to Barbec for $2,250 and that this information caused her to refuse to sell the property to the defendant for less than that amount; and that this action on the part of Hanke was in violation of an implied duty which he owed the defendant.

We do not think that there is much merit in this contention. Hanke was a real estate broker and in the transaction in question it was his duty to fairly present all the facts in his possession with reference to the property and the prospects for its purchase to Mrs. Foster. The defendant's wife was not required to pay $2,250 for Mrs. Foster's property after an offer of $2,000 had been accepted. There was sufficient evidence heard on the trial to sustain the conclusion of the trial court that the plaintiff had not violated any express or implied duty he owed the defendant.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

378 - 23353

208 I.A. 309

ANDREAS PIENTA,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court of Cook County in favor of the plaintiff and against the defendant for the sum of $10,000.

Plaintiff was injured as the result of a collision between a street car and a wagon on which he was riding, in Ashland avenue, a short distance south of 31st street, in the city of Chicago. Ashland avenue is a north and south street, and 31st and 32nd streets extend east and west. The defendant was on the day of the accident operating street cars on Ashland avenue on two tracks laid down in about the center of the street. The westerly track was the south-bound track and the easterly track the north-bound track.

The plaintiff, who was 18 years of age, resided with a man named Sova, who conducted a butcher shop. About noon on January 18, 1913, one Ptasek, in the course of his employment for Sova, was driving a single horse wagon south on Ashland avenue, and plaintiff was riding with him on the left side of the wagon seat. Although not employed by Sova, the plaintiff had at other times accompanied Ptasek for the purpose of aiding him in lifting heavy merchandise in and out of the wagon. On the day in question the plaintiff accompanied Ptasek at his request in order to help him handle certain sauerkraut barrels. Just before the accident

occurred Ptasek drove the horse and wagon southwest on Archer avenue and from there he turned south on the west side of Ashland avenue. As he approached a point about 300 feet south of Archer avenue he found that a heavy motortruck was standing diagonally across Ashland avenue in such manner that its end extended near or onto the south-bound track. He thereupon drove the horse in an easterly direction and then when south of the truck he drove in a westerly direction to continue his course south on the west side of Ashland avenue. As the horse and wagon were driving immediately south of the east end of the truck and toward the west side of Ashland avenue, the northwest corner of a north-bound street car, in the control of employees of the defendant, struck the rear end of the wagon, as a result of which plaintiff was thrown to the ground and he thereby sustained injuries.

The facts as above stated are substantially conceded by the parties to the suit, but there is much conflict in the evidence as to certain material matters which the jury were called upon to decide. Ptasek testified that he turned toward the east to go around the end of the truck, when he was about 100 feet from the truck. The plaintiff puts this point at about 30 feet therefrom.

There is sharp conflict in the evidence as to the speed and location of the street car at and following the time when Ptasek started to drive around the east end of the truck. Three witnesses, who were all riding on the front platform of the car, testified on behalf of the plaintiff. One of these witnesses said he saw the wagon driving into the north-bound track when the street car was at 33rd street, a distance of more than 1,000 feet from the point where the wagon was struck. Another witness stated that he saw

the horse and wagon turn into the north-bound track when the car was 350 feet away. Ptasek, the driver of the wagon, testified that when he drove into the north-bound track he saw the street car at a distance of two or three blocks south of him. For defendant, the motorman testified that he first saw the wagon when it was in the south-bound track, about 150 feet away from the car; that when the horse's head was swinging over toward the north-bound track the car and wagon were about 50 feet apart. The testimony of the motorman is corroborated by that of other witnesses who were riding in the street car.

There is also much conflict in the evidence as to the speed of the car at and just before the time of the collision; also as to the distance that the car ran after it struck the wagon. A witness for the plaintiff who was riding on the car said that the car "never slowed down a bit. Have no idea how fast the car was going, but it was going full speed, that is, as fast as she could." Other witnesses said that from the time the car, in its course north, left 35th street, "it was going fast." The testimony of the plaintiff's witnesses is to the effect that the car was going fast. The motorman testified that "the car was drifting along with my power off," that the last stop made by the car before the collision was at 35th street, a distance of about four and one-half blocks from the scene of the accident; that between these two points nobody had signaled him to stop the car and he saw no reason why he should stop it before he saw the wagon in which plaintiff was riding about to pass around the east end of the truck; that he was quite sure when he got to 32nd street he had reduced the speed of the car to 12 miles

an hour; that if his car was "drifting along" at 12 miles an hour he could have stopped it at a distance of about 35 feet; that if the car was running at the rate of 18 miles an hour it could be stopped within a distance of from 150 to 200 feet.

Certain witnesses testified that after the accident occurred the street car stopped about opposite or a short distance north of the place where the wagon had been pushed by its impact with the street car, while other witnesses say that the car ran from 50 to 100 feet after the collision occurred.

There is a direct conflict in the testimony given by the witnesses on these material questions. There was evidence submitted from which the jury could find that the car was going at a high rate of speed when it struck the wagon, as also that the driver of the wagon attempted to drive around the standing truck under circumstances which, in view of the approaching street car, constituted negligence on his part. These questions were peculiarly for the jury, and it was their province, under proper instructions, to decide them.

Plaintiff was chargeable by law with the exercise of reasonable care for his own safety, (Flynn vs. Chicago City Ry. Co., 250 Ill. 460) and if the evidence heard on the trial tended to prove that the injuries which he received were the result of negligence of ~~xxxx~~ employees of the defendant, or of the joint negligence of such employees and the driver of the wagon, then, if the jury found that the plaintiff was himself free of negligence, the defendant company would be legally liable for the injuries, if any, which plaintiff sustained. The question of

the plaintiff's contributory negligence and that of the negligence of the defendant's employees and of the driver of the wagon were questions of fact, the decision of which the law imposed upon the jury.

It is contended for the defendant that the court in ruling on the instructions tendered by the parties committed serious and reversible error. At the request of the plaintiff the court gave the following instruction:

> "The plaintiff is a competent witness in his own behalf, and you have no right to discredit his testimony from caprice nor merely because he is the plaintiff. You are to treat him in the same way as any other witness, and subject him to the same tests as are legally applied to other witnesses."

It is insisted that this instruction is erroneous in that it in effect directed the jury to treat the plaintiff in the same way and to subject him to the same tests as were legally to be applied to other witnesses. This contention finds support in a decision of this court filed June 11, 1917, in the case of Hedger v. C. C. Ry. Co. It does not appear, however, in the decision of the Hedger case whether any other instructions had been given to the jury in that case which tended to modify or correct the error which was found in the instruction therein condemned. Mr. Justice Holdom in his opinion said that -

> "A party as a witness in his own cause is regarded differently from a witness who has no interest in the litigation. The jury should have been instructed that they had the right in weighing the evidence to determine how much credence should be given to it, and in so doing take into consideration that he is the plaintiff and interested in the result of the suit."

The instruction complained of here is, when disconnected from other instructions given to the jury, clearly faulty.

At the request of the defendant the trial judge

read to the jury an instruction which is as follows:

> "You are instructed that while the law permits the plaintiff in the case to testify in his own behalf, nevertheless you have the right in weighing the evidence and determining how much credence is to be given to it, to take into consideration that he is the plaintiff and interested in the result of the suit."

In Dickerson v. Henrietta Coal Co., 251 Ill. 202, the trial court gave an instruction to the jury as follows:

> "The jury are further instructed that while the law permits the plaintiff in a case to testify in his own behalf, nevertheless the jury have the right, in weighing his evidence, to determine how much credence is to be given to it, and to take into consideration the fact that he is the plaintiff and interested in the result of the suit, *and to weigh his testimony by the same tests as applied to other witnesses.*"

The last clause, in italics, was added to the instruction by the court, and it was insisted that this modification rendered the instruction erroneous. In deciding the case the Supreme court said:

> "A like instruction was offered in Henrietta Coal Co. v. Martin, 221 Ill. 460, and in Mertens v. Southern Coal Co., 235 id. 540, and in each instance it was modified by the court in the same particular that it was modified in this case, before it was given to the jury. In each of these cases it was held that the offered instruction was properly modified."

It will be noted that in the cases last above referred to the instructions included a statement that the jury had "a right to and should take into consideration the fact that he is the plaintiff in this suit." This statement is omitted in the instruction complained of here. It is, however, included in the instruction given at the request of the defendant. The precise question involved here does not appear to have been determined by the Supreme court. We are inclined to think, however, that no reversible error was committed in the giving of this instruction. When read in connection with the instructions tendered by the defendant, the

read to the jury an instruction which it is claimed:

"The sole instructed that while the law permits the plaintiff to the money in dispute in his own right, nevertheless you have the right to consider the evidence and determine for yourselves if it is true or false, if it be true then the money belongs to the plaintiff and if it be false the defendant is the rightful owner.

In Blackmore v. Lafayette Cent. Co., 90 Ill. 171, 172, the trial court gave an instruction to the jury in following:

"The jury are further instructed that while the law permits the plaintiff to a verdict in his own behalf, nevertheless the jury have the right, in determining the evidence, to determine how much credit to be given to it, and if they find from the evidence that the plaintiff has intentionally or by mistake, or from any other cause, stated to the jury any thing which is not true, then it is their duty to disregard the testimony of the plaintiff in the case, and to find in favor of the defendant."

The last clause, in italics, was added by the instruction of the court, and it was insisted that this modification rendered the instruction reversal. In determining the case the supreme court said.

"A jury instructed the effect is intended that is, a matter, the is, also, and is further if, instructed that is, the is, also, and is further if, was modified by the court in the case particular that it was modified in this case, unless it was given in the jury. In order of cases where it was only that the instructed instruction was properly modified."

It will be noted that in the cases just cited reference to the instructions contained a statement that the jury was to rely on and which have been substituted the fact that in it the majority in this case." The statement is omitted in the instruction contained of cases. In ex. instructions, instead in the instruction given at the request of the defendant, the jurors instruction instructed were that appear to have been extracted in the opinion court. In are instructed to which, however, that no consistent with the instructed in the giving of this instruction. What was in cases instructions the instructions instructed by the defendant, the

jury are definitely told that they should take into consideration the interest of the plaintiff witness; that otherwise his testimony was to be treated in the same way and subjected to the same tests as that of other witnesses who testified.

An instruction was read to the jury at the request of plaintiff which in effect informed the jury that it had no right to consider statements made by a witness or witnesses out of court except insofar as such statements tended to effect the credibility of the witness or witnesses who made them. Except as applied to the testimony of the plaintiff the instruction was not erroneous. Statements of witnesses out of court are not to be regarded as admissions binding upon the interest of a party who has in no way directed the making of such statements. Generally evidence of a contradictory statement of a witness out of court is admissible solely for the purpose of showing that such witness has made statements tending in some material way to contradict his testimony, and where such witness is not a party to the suit and has no apparent interest therein he is not permitted by the law out of the presence and without the direction of a party interested to bind such party by anything that he may say out of court; hence the reasonableness of the rule which provides that the contradictory statement of such witness made out of court may not be evidence of any fact in issue between the parties to the suit.

We are not prepared to hold that the instruction in question is not erroneous when applied to the statements of the plaintiff. We do not think, however, that the evidence tends to show that the plaintiff made any statements out of court or on a former trial which materially contradicted his testimony given in the last trial. At a former

trial the plaintiff testified as follows:

> "Q. When you were turning to the left, well, how far away was the car at that time?
>
> A. About four or five blocks."

On the trial from which this appeal is taken plaintiff testified that when he saw the car it was far away. We do not think that these statements are contradictory. Both statements may well be in accordance with the truth.

At the request of the plaintiff the court instructed the jury as follows:

> "The court instructs you that while the law does not regulate the precise rate of speed at which a street car must be run under given circumstances, it does however require that said cars be operated with reasonable care so as to prevent them from injuring others lawfully using the streets in which said cars are being operated."

We think this instruction is fairly subject to some of the criticism of counsel for defendant, though it it not in substance similar to the instruction the giving of which was held error in Wabash, St. Louis & P. Ry. Co. v. Coble, 115 Ill. 115. In that case the Supreme court said:

> "This was error. The requirement that appellant should give 'such signals to persons crossing that all may be apprised of the danger of the crossing and railroad track,' is condemned in Chicago, Burlington and Quincy Railroad Co., v. Dougherty, 110 Ill. 521, Peoria, Pekin and Jacksonville Railroad Co. v. Siltman, 67 id. 72, and Chicago and Alton Railroad Co. v. Robinson, 106 id. *** What 'signals' were to be given, and in what manner such 'lookout' was to be kept, the jury were not informed, further than that they were to be such that all might be apprised of the danger of the crossing, and that the 'lookout' was to be such as to see, and as far as possible prevent injury to others. With these ends in view, the jury are left to be judges of what shall be the 'signals' and the 'lookout.' But counsel insists that the instruction must be construed with reference to the case actually being tried. The difficulty is, the instruction directs the minds of the jury away from the case actually being tried, and allows them to find the appellant guilty of negligence on a ground not charged in the declaration."

In the Coble case, supra, the jury were told it was the duty of the defendant to give certain signals so

that persons crossing a railroad track might be apprised of danger, etc. This instruction was properly held bad for the reason that the plaintiff did not rely, in his declaration, upon a failure on the part of the defendant to perform such duty, and, further, that the instruction required the giving of signals so that "all might be apprised of the danger of the crossing."

The instruction here under consideration is somewhat vague in that it informed the jury that the cars running in the public streets were to be operated with reasonable care so as to "prevent them from injuring others lawfully using the streets." Standing alone this language might be taken to mean that if the defendant had operated its cars with reasonable care, the injuries to the plaintiff could have been avoided, but when the instruction is read in connection with instructions 49 and 50, given at the request of the defendant, we do not think the jury were misled by the language of the instruction. One of these two instructions in substance informed the jury that if the street car was operated with ordinary care, and that the wagon in which plaintiff was riding was driven on the track in front of the car so suddenly that the motorman had no opportunity by the exercise of ordinary care and caution to avoid injuring the plaintiff, then defendant was not liable. The other instruction told the jury that the crew of the car were not required to exercise the highest degree of care to avoid injuring the plaintiff, and that if the motorman in the exercise of reasonable care did all that he could to avoid the accident as soon as it was apparent or ascertainable to him, in the exercise of ordinary care, that the plaintiff was getting upon or near the track, then the plaintiff could not recover. These with other instructions correctly informed the jury as

that patrons crowding a railroad track which is apparent of danger, pls. This institution has repeatedly held for the reason that the plaintiff did not sue, in the instrument, upon a failure on the part of the defendant to perform some duty, and, further, that the instructions required the giving of signals so that "all might be warned of the approach of the crossing."

The instructions were based upon considerations as reasonable upon it that it contained the fact that the area tending to the public street were in the industrial yard. reasonable area so as to prevent some from injuring others lawfully using the street." Holding that the instructions might be taken in each case of the accident had occurred the data with reasonable care, the failure to the plaintiff could have been avoided, the fact the instructions in case in addition with instructions as set it, given to the request of the defendant. We do not issue the jury was asked to the liability of the railroad. The if there the instructions there in authoritative decided the jury that if the street car was crossing the street car, and that the steps at which plaintiff was going the driver on the track to front of the car so suddenly that the defendant had no opportunity to the exercise of ordinary care and caution to avoid injuring the plaintiff, that defendant was not liable. The plaintiff-like this the jury that the time of the and were not required to consider the general nature of duty to avoid injuring the plaintiff, and that if the motorman in the exercise of reasonable care his car that driver could be seen the motorman as soon as it was approach in sufficient to the, in the exercise of ordinary care, such knowledge and getting room crossing the track, that the plaintiff could not recover. There was also instructions requested that the duty on

to the duty which the law imposed upon the defendant's servants under the circumstances attending the accident, and it is clear from the number and length of the given instructions that the jury were not misled by the instruction complained of.

Substantially the same answer may be made to the criticisms of given instruction No. 22.

Complaint is made of the action of the trial court with reference to rulings on other instructions, as to which we think no reversible error was committed.

The case has been tried twice. Forty-two instructions were read to the jury, some of them lengthy, but when all are read together we think the jury were not misled by such inaccuracies therein, if any, as have been discussed by counsel.

A juror who sat in the trial did not disclose on examination before he was accepted as a juror to try the issues that his wife had met with an accident on a sidewalk. The juror was asked whether he or any of his relatives had ever been in a street car accident, or whether he or any of his family had been interested "in a case of this kind." The juror's answers to these questions were in the negative. The affidavits read in support of the motion do not disclose that the juror's answer to the first question was untrue. The affidavit does show that the juror's wife was injured in a sidewalk accident, and that she had settled a claim arising therefrom with the City of Chicago for $200. It cannot be said that the juror was called upon to disclose the fact of this accident when he was asked the latter question. The juror might reasonably have concluded that the expression "in a case of this kind" referred to a case involving a street car accident.

The judgment in favor of the plaintiff is for the sum of $15,000, and it is insisted that this is excessive compensation for the injuries received. Plaintiff was 18 years of age at the time he was injured and prior thereto he was healthy. As a result of the injuries he received he was taken to a hospital, where it was found that he had two head wounds; one of such wounds went down to the bone, and an attending physician stated that because of certain symptoms it was determined that the plaintiff was suffering from a hemorrhage within the skull cavity. A surgical operation known as trepanning was performed. This operation is described as follows:

> "Three holes were bored in the skull, one in front, one at the top and the other behind the ear. These borings were the entry points for a semi-circular cut from the middle of the zygoma, a point in front of the ear, curved upwards over the ear and ending at the base of the mastoid process (located behind the ear); after making this cut the base of the flap thus made was nicked a little and the flap pried open until it broke at its base. All the tables of the skull were cut through. A blood clot, weighing about an ounce, caused by a rupture of the meningial artery, was removed, packing inserted to prevent further hemorrhage and the flap cut in the skull replaced with the end of the packing brought out through one of the trephined holes."

Plaintiff remained at the hospital about three weeks and returned thereafter for dressings. The evidence tends to prove that following the operation and up to the time of the trial plaintiff has suffered from a necrosis of the skull bone; that since the date of the accident, the plaintiff has been subject to epileptic seizures and that these attacks were caused by the injuries which plaintiff received. There is also evidence in the record which tends to show that the ability of the plaintiff to earn a livelihood was seriously affected by the injuries which he sustained. The amount of damages awarded by the verdict of the jury is high, but not so much so as to indicate that the jury was actuated by motives of passion or prejudice

when it awarded this sum to the plaintiff. If the testimony of the witnesses for plaintiff be true, then he has sustained injuries which are serious in their nature and which may render him an invalid for the remainder of his life.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

when it appears that one is sub-standard. If not immediate of the statement the statement be given then in the accepted industry which are seeking to train students and which may further use as useful for the consideration of its life.

The Department of the Library Science will be affiliated.

Affiliation.

23425

208 I.A. 312

D. MAZOR and A. COHEN,
Appellees,

vs.

B. HANDLER et al.,
On Appeal of B. HANDLER,
Appellant.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from an interlocutory order of the Circuit Court of Cook County denying a motion to dissolve an injunction which had been entered in the cause.

It is contended by the defendant, B. Handler, that the injunction should have been dissolved for the reason that the amended bill of complaint shows upon its face that the complainants were not entitled to the relief prayed for in the bill.

In the bill of complaint it is alleged that the complainants, D. Mazor and A. Cohen, were engaged in the bakery business in Chicago; that in August, 1916, they made a statement of their business affairs and financial conditions to the defendant, B. Handler, for the purpose of obtaining a loan of money from him; that in the same month the complainants delivered to defendant, Handler, a promissory note for $600, payment of which was secured by a chattel mortgage; that thereafter this note was paid and that the complainants delivered two notes, one for $200 and one for $300, bearing the endorsement of the defendants, Cornish and Rubenstein, to Handler.

The bill alleges that Handler secured a judgment by confession in the Municipal Court of Chicago against complainants for the sum of $582.50, being the amount due on

the two notes, including interest and attorneys fees; that thereafter on November 25, 1916, the complainants filed a petition in the Municipal Court to quash an execution which had been issued on said judgment; that the court overruled a motion to quash the execution and that complainants prayed an appeal from such order, which was allowed; that through error the order denying the motion to quash the execution was entered of record in the following words and figures.

> "Motion defendants to vacate judgment of November 22, 1916, overruled bond $800.00 in 30 days bill of exceptions 60 days."

It is also alleged in the bill that Judge Martin, who entered the order in question "is no longer a judge of the said court and that it would now appear that the judges remaining decline to assume any power to act upon said cause and said improvident order whereby your complainants could secure the entry of a proper order upon the appeal and therefore your complainants say that they have no adequate remedy at law against the conduct of said B. Handler."

The bill alleges in detail that because of the alleged error of the Clerk of the Municipal Court the complainants were unable to secure a review, in the Appellate Court, of the order of Judge Martin "overruling the petition," and that Handler had threatened to bring suit upon the appeal bond which had been filed; that more than thirty days had elapsed from the time of the entry of such alleged erroneous order before complainants discovered the error of the clerk.

The bill of complaint is insufficient on its face to authorize the order of injunction entered by the Circuit Court. It does not appear in the bill what allegations were made by the complainants in their petition to

the law notes, including interest and brokerage fees; last
otherwise to provide do, like, the constitution like a
petition in the municipal Court to speak on behalfing which
has been issued by said judgment; that the court rejected
a motion to quash the execution and that subsidiaries proved
an appeal from such order, which was allowed; that because
error the order denying the motion to quash the execution
was entered of record in the following words and figures,

"Motion defendants to quash judgment of the
October 21, 1911, presented upon petition to be made bill
of exceptions on hand."

It is also alleged in the bill that Julia
Curtis, who entered the order in question "is an inferior
a judge of the city court and that it could not assume that
the judge presiding during to assume any power to act upon
said cause and make determination after making such execution
could assume the order of a person other than the ap-
peal and therefore plaintiffs say that they have no
adequate remedy at law against the judgment of said C.
Dunlap."

The bill alleges in substance that because of the
alleged error of the court at the municipal Court the com-
plainants were unable to secure a bonded in the appellate
Court, of the order of the Circuit Court upholding the peti-
tion," and that further the interposed to bring suit upon
the appeal bond which has been filed; that more than thirty
days had elapsed from the time of the order of said Circuit
Court upon which the complainants discovered the error of
the court.

The bill of complaint is modified so as
from to restrain the enforcement of judgment entered by the
Circuit Court. It appears from the bill that plain-
tiffs were made to pay complainants in their petition in

quash the execution issued on the judgment of the Municipal court. For aught that appears the petition may have been wholly defective, and whatever the merits of the controversy may be with reference to the alleged error of the Clerk of the Municipal court, before such error could have been corrected the petition should have shown facts which would authorize the Municipal Court to amend its records.

The alleged error in the entry of the order in the Municipal court was one which that court had full power to correct. It is quite true that the court would not have power to make a substantial change in its original judgment unless such change was made within the statutory period, but in the application of this rule to the facts as they appear in complainants' bill, no change in the judgment of the court was required. The complainants do not seek to change the order which was actually directed by that court, but to require the records to speak the truth with reference thereto.

The contention of the complainants here is that the Municipal Court had no power to change its order after the 30 day period had expired. In this they are in error. The alleged error in the order was of a clerical character. The allegation is that the order appealed from should have recited that the motion in the Municipal Courtto quash the execution was denied, but that through error, the order in fact entered was a denial of a motion to vacate the judgment of November 22, 1916.

There are no allegations in the bill from which it may be inferred that the complainants were not in fact guilty of negligence in failing to be apprised of the form of the order which was entered, but waiving this, we are of opinion that the error could have been corrected in the Mu-

quash the execution issued on the judgment of the municipal court. For might that appear the politics may have been mostly defective, but whatever the merits of the ministerial may be with reference to the alleged error of the judge of the municipal court, before such error could have been corrected the petition should show first that which would authorize the municipal court to commit its mandate.

The alleged error is the entry of the order in the municipal court. See one which that party had full power to correct. It is quite true that the court would not have power to make a substantial change in the original judgment unless such change was made within the statutory period, but in the application of this rule to the facts as they appear in complainant's bill, no change in the judgment of the court was implied. The complainants do not seek to change the order which was actually entered by that court, but in reality the mandate is prayed the with reference thereto.

The position of the complainants here is that the municipal court had no power to change its order after the 30 day period had expired. In this they are in error. The alleged error in the order was of a clerical character. The mistake in the order as first appeared from records proved that the motion in the municipal court was made the execution was denied, but that decision stated, the order is that stated was a denial of a motion to vacate the judgment of forfeiture 30, 1919.

There are no discrepancies in the bill from which it may be inferred that the complainants were not in fact guilty of negligence in failing to be apprised of the fact of the order which was entered, but waiving this, we are of opinion that the error could have been corrected in the mu-

nicipal court by motion, even though 30 days had elapsed between the date of the entry of the judgment and the time when complainants were informed of the alleged error of the clerk. Stated differently, it is apparent on the face of the bill that the complainants had an adequate remedy at law.

The bill of complaint alleges that the judgment of the Municipal Court, which is sought here to be set aside, was entered by confession. If the notes upon which the judgment was entered were in part without consideration, or if they had been in part paid, or if the transaction in which they were executed was partly illegal because usurious, the Municipal Court had ample power to give the complainants every relief which they seek to obtain by their bill. The law gave them the right to move in the Municipal court to quash the execution, or to vacate the judgment, and if, on a sufficient showing, the Municipal court abused the discretion which the law vests in it, then such abuse could have been corrected by appeal to a court of review.

We know of no reason why any judge of the Municipal court did not have legal authority to entertain a motion to set aside the judgment. It is asserted in the bill that "the judge remaining" declined to assume any power to act to correct the alleged error in the order entered by Judge Martin. We are not certain as to just what is meant by this assertion. If counsel means that all of the judges of the Municipal court refused to act in the matter, then his bill fails to show that he had, by motion or in any other legal manner, requested any judge of that court to correct the error. West Chicago Park Commission v. Boal, 232 Ill. 248. The complainants were not prevented from obtaining relief in the Municipal court through any fraud, accident or mistake.

municipal courts by motion, even though it were not planned between the date of the entry of the judgment and the time when complainants were informed of the alleged error of the clerk. Stated differently, it is apparent from the text of the bill that the complainants had an adequate remedy at law.

The bill of complaint alleges that the pleadings of the municipal court, which is should have to be not active, was entered by confession. If the notes upon which the judgment was entered were in part without consideration, as it they had been in part paid, or if the transactions in which they were executed was illegal usurious interest, the municipal court had ample power to give the complainants every relief which they were entitled to under bill. The law gave them the right to move in the municipal court to quash the execution, or to vacate the judgment, and if, on a sufficient showing, the municipal court ignored the direction which the law vests in it, then such issues could have been presented by appeal to a court of review.

In cases of ill repute the mere judge of the municipal court did not have legal authority to entertain a motion to set aside the judgment. It is asserted in the bill that "the judge complained" declined to assume any power to act in correct the illegal error in the order entered by Judge Martin. We are not certain we do just what is meant by this assertion. If counsel means that all of the judges of the municipal court refused to act in the matter, then the bill fails to show that it was, by motion or in any other legal manner, requested any judge of that court to correct the error. Pure Oxygen Co. v. Ford, 82 Ill. App. 111, 114. The complainants were not privileged from exhausting proper relief in the municipal court through any fear, nervous or mental

The law gave them an opportunity by proper proceedings to present their defenses in that court and by appeal to correct any error which might have been committed in any of the proceedings to obtain or vacate judgment upon the notes. Under such circumstances a court of equity will not afford complainants any relief. Cosgrove v. City of Chicago, 235 Ill. 358.

It was held in Tallman v. Becker, 85 Ill. 183, that a court of equity would grant relief against a judgment at law only in cases of fraud, accident or mistake, and in such cases only where the party seeking such relief has used the highest degree of diligence to prevent the fraud, accident or mistake.

It is contended by counsel for complainant that this appeal should be dismissed for the reason that the record filed here does not disclose that an order was entered of record in the Circuit court allowing an appeal of the cause to this court. The record does disclose that the complainants prayed an appeal, and this prayer was followed by the filing of an appeal bond for costs. No order of the Circuit Court allowing the appeal was necessary. Iroquois Furnace Co. v. Kimbark, 85 Ill. App. 404.

The order of the Circuit court denying defendants' motion to dissolve the injunction is reversed and the cause remanded to the Circuit court with directions to sustain a motion to dissolve the temporary injunction and to dissolve the injunction.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

The law have been so unfortunate by proper pleadings to ren-
ders their defense in that court not to repeal it without any
error which might have been committed in not of the proceedings
to obtain by remote judgment upon the case. Their such cir-
cumstances a court of equity will not afford consideration one
relief. Chancery v. Lair et Bowman, 4th (1). 780.

It was held in Tarlton v. Lanier, 23 (1). 443,
that a court of equity would grant relief against a judgment
at law only in cases of fraud, accident or mistake, and in
such cases only where the party seeking such relief has used
the highest degree of diligence to prevent the fraud, acci-
dent or mistake.

It is contended by counsel for complainant that
this court should be dismissed for the reason that the cause
filed here has not distinct time so long as was returned of
record in the circuit court allowing an appeal of the cause
to this court. The record does disclose that the complainant
prayed an appeal, and this prayer was followed by the filing
of an appeal bond for costs. In order of the circuit court
allowing the appeal was necessary. Georgia Pacific Co. v.
Slaton, 40 (1). 490, 494.

The order of the Circuit court sustaining defendants'
motion to dismiss the injunction is reversed and the cause re-
manded to the circuit court with directions to enter a decree
to dissolve the temporary injunction and to dismiss the in-
junction.

Reversed and remanded.

318 - 23284

208 I.A. 314

ISADOR KORN,
Appellee,

vs.

ANNIE NAGEL,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill on the chancery side against the defendants, John Nagel and Annie Nagel, husband and wife, asking among other things that deeds conveying certain real estate to Annie Nagel be set aside and the interest of John Nagel therein be subjected to the payment of a judgment had by complainant. Upon reference to a master in chancery, evidence was heard and a report made and a decree recommended in accordance with the prayer of the bill. Upon hearing of exceptions before the chancellor the same were overruled, the master's report affirmed and a decree entered in accordance with the recommendation, from which Annie Nagel has appealed to this court.

The salient facts as found by the master, and which are not seriously in controversy, are that in October, 1913, the complainant and John Nagel were engaged as co-partners in the automobile repair business; that Nagel contracted to buy the business from complainant for $1,750, paying $500 cash and the balance in notes secured by chattel mortgage upon the business. In January, 1908, John Nagel and Annie Nagel, his wife, purchased for $6,700 the real estate described in the bill of complaint, and became seized of the same as joint tenants and not as tenants in common, and on February 3, 1914, so owned the property subject to an encumbrance of $2,500. On or about this date John Nagel, de-

siring to borrow $500 upon this real estate, requested his wife to join with him in a mortgage thereon to secure the same, but she, for the reason, as she stated, that he had lost considerable money in business propositions, refused to join with him in the mortgage unless he would place the title in her name. Thereupon Nagel and his wife executed their joint promissory note for $500, and also a trust deed conveying said premises to secure the payment of said note; the note was delivered to the State Bank of Chicago, which paid to John Nagel the sum of $500. The evidence shows that subsequently, on May 5, 1914, the $500 note was paid and the lien of the trust deed released.

On the same day that the note for $500 and the trust deed securing same were executed, that is, on February 3, 1914, for the purpose of vesting the entire title to said premises in Annie Nagel, she, with her husband, John Nagel, executed and delivered a quitclaim deed to August W. Rheim. It further appears that Rheim and wife, on February 4, 1914, duly conveyed said real estate by quitclaim deed to Annie Nagel; that no consideration passed from Rheim to John Nagel and Annie Nagel, and no consideration from Annie Nagel to Rheim, except the consideration above referred to, namely, the joining of Annie Nagel in the trust deed to secure the note of $500. It also appears that at this time this was the only property owned by John Nagel.

Subsequently, in April, 1914, John Nagel closed up the business and tendered the keys to complainant, stating that he could not carry on the business longer. Thereafter, in May, the complainant executed a release of the lien of his chattel mortgage and received therefor the sum of $300

in cash, said release reciting that the notes had been declared due under the terms of said mortgage on account of depreciation and waste. Out of this sum the complainant paid the past due rent for the premises occupied by Nagel, and credited the notes with the balance. It was the understanding of the parties at this time that the release of the lien of the chattel mortgage and the acceptance of the sum of $300 was without prejudice to the right of the complainant to any claims which he might have upon the notes.

Thereafter, on June 24, 1914, complainant obtained a judgment on these notes in the Municipal Court for the sum of $989. Execution was issued but returned in October, 1914, no part satisfied. On December 18, 1914, John Nagel, under examination on petition for citation, declared he had no property in the city of Chicago subject to execution.

The master found that there was still due and unpaid the sum of $989 with interest from the date of judgment; he also found that the transfer whereby title to the property was placed in Annie Nagel had the effect of putting John Nagel's property out of the reach of his then creditors, and that these conveyances under such circumstances were presumptively fraudulent, and as to creditors whose claims were in existence at the time of such conveyances were void.

We have no difficulty in concluding from the uncontroverted facts that the finding of the master was right and that the decree in accordance with his recommendation should be affirmed.

At the time of the attempted conveyance to his wife, John Nagel's interest in the real estate was worth approximately $2,200. At this time he was indebted to the complainant to the amount of $1,250 upon his notes. The

conveyance to his wife was in fact without any money consideration. The evidence shows that the $500 which was borrowed on the joint note and trust deed was paid. Annie Nagel does not claim to have paid the same, and it does not appear that she parted with anything of value whatever in consideration of joining in this trust deed; its lien has been released, so that the entire transaction between the defendants to the bill merely effected the withdrawal from John Nagel of property which his then creditor, the complainant, was entitled to have subjected to payment of the indebtedness due him. Under similar circumstances the courts have in many instances declared such conveyances void. Among such cases are Stevens v. Dillman, 86 Ill. 233; Gordon v. Reynolds, 114 Ill. 118; Davidson v. Burke, 142 Ill. 159; Kennard v. Curran, 239 Ill. 122.

The case last above mentioned is an authority in answer to the suggestion of the attorney for the appellant that insolvency of John Nagel must be shown. As was said in that case, actual insolvency is not necessary in order to render a voluntary conveyance void, and it was there said to be the settled rule that if a person is largely indebted and makes a voluntary conveyance, and shortly thereafter becomes insolvent, it is proper to set aside the conveyance as fraudulent. Hauk v. Vanlingen, 196 Ill. 20.

We are not holding that simply because of the relationship between them that a transaction between husband and wife is void, but it has been frequently held that this relationship should be scrutinized closely in determining the character of transactions which have the effect of working a fraud upon creditors. Lachman v. Martin, 139 Ill. 450.

There is no merit in the point that complainant

must exonerate the interest of Annie Nagel in the property to the extent of $500 which it is said John Nagel received from her for his share of the property. This is predicated upon an erroneous conception of the evidence. Annie Nagel gave no money nor any property to John Nagel; the $500 received on account of the loan was given by the bank to John Nagel, and presumptively it was paid by him; there is no evidence whatever that Annie Nagel paid it.

We cannot concur in the contention that the theory of the case appearing in the bill of complaint is not followed by the decree. We think the language of the bill is sufficiently broad to include the transaction which was proved on the hearing, and the decree is in accordance with the facts proven.

There is no valid ground for disturbing the decree, and it is affirmed.

AFFIRMED.

329 - 23295

208 I.A. 315

HENRY F. WARDWELL,
Appellee,

vs.

HOCKING VALLEY RAILWAY COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover damages for an alleged breach by defendant of its contract to sell plaintiff 300 second-hand coal cars, upon trial by the court had judgment for $14,250 from which defendant appeals.

It is not in controversy that defendant, acting through E. J. Caples, a vice-president with authority, on December 28, 1912, in writing agreed to sell to plaintiff "three hundred of the Hocking Valley thirty-ton flat bottom coal cars at $210 each, delivered on the line of road in their present running condition, terms - cash upon delivery of cars to you," which was accepted by plaintiff, and that subsequently defendant did not deliver the cars, although delivery was frequently requested by plaintiff, who was ready and able to pay the agreed price for them. The point of controversy is the time of delivery, the plaintiff contending that under the law this must be within a reasonable time, and the defendant asserting a mutual understanding, namely, that deliveries to plaintiff should follow the completion of deliveries under prior contracts of sale, one for 1,500 cars to the Central Locomotive and Car Works, and another of 100 cars to the General Equipment Company. The trial court was evidently of the opinion that the proof failed with regard to this latter condition and that defendant was obligated for deliveries to plaintiff within a reasonable time.

ROBERT E. JACKSON,
Appellee,

vs.

SOUTHERN VALLEY RAILWAY COMPANY,
Appellant.

MR. JUSTICE BRANDEIS delivered the opinion in the court.

JURISDICTION. Involving only an interest amounting to an alleged excess of jurisdiction of its carriers in fixing rates, the interstate-commerce court, upon issues by its court that judgment for $14,000 was otherwise unjustified.

IN DOUBT IS CONSTRUED THAT JURISDICTION. Section 17 of the I. C. Act, a jurisdictional and substantive, as December 31, 1912. In writing argued to wait in strikingly "above business of the carrier rates certain-case that before such date of 2001 cases, motivated on the line of road in their present rending decisions, taken - also upon delivery of note to you," which was subject to jurisdiction. and that independently determined it not decline the note, although delivery was frequently evaluated by jurisdiction. who was ready and able to pay the agreed price for them. The value of warehousing in the case of delivery, the jurisdiction according that such cases the rate made be strictly a transportation line, and the defendant accepting a stated warehousing, namely, that relinquishing to jurisdiction during further the completion of delivering under prior contracts of sale. Use for 1,800 note to the Central Lumbering and the Jacky, and adding of 12% note to the General Lumbering Company. The total amount was authority of the carriers that the trial jurisdiction when received by this Indian condition and that defendant was obligated for delivering to jurisdiction which a reasonable time.

Is this conclusion contrary to the weight of the evidence? We do not think so. Without noting all the details, we are of the opinion that the trial court properly could find that after some preliminary communications by letters and telegrams plaintiff had an interview with Mr. Caples December 28, 1912, in the latter's office with reference to the purchase of the cars; that after some talk a letter of that date was written, addressed to plaintiff, confirming their verbal arrangement then made. The letter, although explicit as to the number of cars, 300 and price, $210 each, and place of delivery and time of payment, says nothing about the time of delivery. Before this letter was written, according to plaintiff's testimony, he stated to Mr. Caples that he was anxious to get the cars delivered within a reasonable, prompt time, and upon being asked by Mr. Caples what was meant by that, plaintiff informed him that it would mean 100 cars in thirty days, 100 in sixty days and 100 in ninety days, and that Mr. Caples agreed to this; that after the letter had been written by the stenographer and signed by Mr. Caples it was handed to plaintiff, who said that he would accept the proposition. Mr. Caples denies the statement of plaintiff as to delivery within a reasonable time, but testified that he told plaintiff that he had previously contracted to sell 1,500 of the same series of cars to the Central Locomotive and Car Works and 100 to the General Equipment Company, and that he could not make delivery to plaintiff until after delivery had been made on these previous contracts. Although Mr. Caples' testimony is supported to some extent by the testimony of his stenographer, Mr. Tillett, we are unable to say that the conclusion of the trial court

to accept plaintiff's version of what was said on the point of deliveries is manifestly against the greater weight of the evidence. Among other considerations influencing us is the fact that Mr. Caples himself testified that at this interview of December 28th he told plaintiff that they were not anxious to sell these cars at that time "because it would be almost impossible to deliver them in any reasonable time and we did not want to incur that obligation. It was only as a favor to Mr. Wardwell that we agreed finally to assume that obligation." This can only be construed as an admission by Mr. Caples that he did agree on December 28th to assume the obligation for deliveries within a reasonable time.

Another point tending to negative defendant's theory is that while defendant, both verbally and in letters, asserted an obligation on its part to make all deliveries of cars to the Central Locomotive and Car Works under a prior contract of sale to this company, inspection of its contract with this company fails to show any such obligation as to deliveries, and rightly considered is not even a contract of sale. There was simply an agreement with the Central Locomotive and Car Works providing for the conversion of 1,500 of the Hocking Valley gondola cars into box cars, allowing the Central company as compensation for this work two of the gondola cats for each converted box car, this work to begin March 1, 1913. The only provision concerning deliveries to the Central company was that the cars should be delivered at such times as the Central company should make request.

It also appears from the testimony of Mr. Caples that at the time he had a preliminary conversation with plaintiff in September, 1912, the defendant had on hand about 2,500 of the kind of cars that plaintiff was seeking to purchase,

and that at the time of the letter of December 28, 1912, it had already delivered to the Central Locomotive and Car Works on its contract all but about 900 cars, thus leaving on hand about 900 cars which were not subject to contract prior to the time of the contract with plaintiff; that before March, 1913, the full quota of cars called for by the Central Locomotive contract had been delivered with the exception of something in the neighborhood of 100; that on March 18th Mr. Caples wrote the General Equipment Company that the defendant would be able to deliver the 100 cars under the General Equipment contract if they were wanted, and received a reply from that company that it had made other arrangements and did not wish to accept them. It also appears that subsequently, except for a few, the remainder of the 2,500 cars, including the 300 cars contracted for by plaintiff, were delivered to the Central company.

It is unnecessary to narrate the frequent communications passing between the parties subsequent to the letter of December 28th, as they are only reiterations on the part of plaintiff of a demand for the delivery of the cars contracted for, and statements by Mr. Caples insisting that no deliveries could be made until the entire number contracted for with the Central Locomotive and General Equipment companies had been delivered. On March 28th plaintiff wrote to the defendant advising it that he was entitled to the delivery of all of the cars under the agreement of December 28th, and was ready, able and willing to carry out his part of the agreement, and requested immediate delivery of the same, and threatened upon failure to deliver to hold the defendant responsible for damages.

There is an abundance of testimony by experienced witnesses to the effect that a reasonable time within which

to deliver 300 cars of the character contracted for would be at the rate of 100 per month. There does not seem to be serious controversy as to what would constitute reasonable time.

After considering the variant testimony and the contentions of counsel, we are unable to say that the court should not have found that the contract called for delivery within a reasonable time, that such deliveries were not made, although plaintiff was all the time ready and able to carry out his part of the agreement, and that he was entitled to damages.

It is contended by the defendant that the damages are excessive, and it is pointed out that it appears from the evidence that within two or three days after plaintiff had contracted to purchase the cars he in turn sold 250 of them to the Canadian Northern Railway for $225 each, which would leave him a profit of $15 a car, and assuming that he might have made the same average profit on the remaining 50, his measure of damages at most could not exceed $4,500, which would be the amount of his profits. The general rule as to the measure of damages on a breach of contract to deliver property is the difference between the contract price and the market price at the time and place of delivery. We do not think it follows that because plaintiff appears to have contracted for 250 ~~xxx~~ of these cars with the Canadian Northern Railway that his price to them was the market price. It appears that the Canadian Northern was a very large buyer of second-hand cars, and that this was the first sale which plaintiff, a broker in such matters, had made to it. It is not unreasonable to assume that a special price might have been made in order to initiate business relations between them. Furthermore, it does not appear that there was any

contract of resale at the time plaintiff entered into his agreement with defendant on December 28, 1912. There is also evidence that this sale to the Canadian Northern was never consummated. There was no repurchase by the plaintiff to make good on his sales to the Canadian Northern, which fact is of controlling importance in the cases cited by counsel for the defendant. No circumstances appear which call for the application of any other than the general rule for the measure of damages, namely, the difference between the contract price and the market price.

The testimony as to the market price varies widely, ranging from $150 a car, as testified on behalf of defendant, to $300 a car, as presented on behalf of the plaintiff. There was testimony as to actual sales to the Canadian Northern from February to May, 1913, at $300 to $320 per car; also sales at a less figure. The judgment of the court as to damages is based upon a finding of a market value of $257.50 per car, and this seems to be well within the scope of the testimony. We cannot say that the court was in error in its estimate.

It is alleged as error that the trial court refused to mark as held certain propositions of law submitted by the defendant. We hold that these propositions were properly refused for the reason that they assumed as facts points which were vitally controverted, namely, the times of delivery; they are wholly inapplicable to the fact as found by the court, that delivery should be made within a reasonable time. Propositions of law submitted to the court should in no case assume the existence of facts in dispute. Lord v. Board of Trade, 163 Ill. 45. And the court may properly refuse a proposition

[illegible] of [illegible] at the time [illegible] [illegible] [illegible]

of law if the evidence fails to establish the facts which it assumes and upon which it is predicated. Mackin v. Haven, 187 Ill. 480. A proposition asked to be held as the law of the case is properly refused when it ignores a part of the evidence, and when not applicable to the facts as found by the court. Gray v. Callender, 181 Ill. 173.

No convincing reason appearing for disturbing the finding and judgment of the court, and no prejudicial errors having occurred upon the trial, the judgment is affirmed.

AFFIRMED.

of law if the evidence fails to establish the facts which it assumes and upon which it is predicated. Lessig v. Ferree, 147 III. 488. A stipulation could not be held as the law of the case if property rights which it ignores a part of the evidence, and does not preclude a jury from as found by the court. Ferry v. Dalrymple, 141 III. 473.

In accordance with the foregoing the trial and judgment of the court, and the proceedings entire having occurred upon our joint, the judgment is affirmed.

Affirmed.

359 - 23325

208 I.A. 325

JOHN KICK,
Appellee,

vs.

CALUMET & SOUTH CHICAGO RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover damages for personal injuries, upon trial was awarded a verdict of $900, upon which judgment was entered from which defendant appeals.

The accident happened about six o'clock on the morning of November 18, 1911, near the corner of 75th street and Oglesby avenue, in Chicago. It involves the rather familiar occurrence of a wagon turning into a street car track in the path of an oncoming car, with a resulting collision.

The driver of the wagon was a man named Silversdorf, plaintiff sitting beside him; and it is contended that even if Silversdorf, the driver, was negligent in turning his horses onto the track, his negligence cannot be imputed to the plaintiff. The general rule invoked is not applicable to the present circumstances. The evidence shows without controversy that plaintiff was in charge of the wagon and team, and that Silversdorf drove as directed by him. The wagon was a bread wagon, making deliveries at various points, and plaintiff was teaching Silversdorf the route. Plaintiff would direct Silversdorf to the stores where deliveries were to be made, and when such deliveries had been made would tell him where next to go. Immediately before the collision the plaintiff and Silversdorf had been making deliveries at the northwest corner of 75th street and Oglesby avenue; 75th

JOHN BIRK,

Appellee,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,

Appellant.

Appeal from the Circuit Court of the City of Baltimore.

Opinion.

Filed October 18, 1921.

PLAINTIFF, Bringing suit in trover against the defendant railroad company, upon proof of a conversion of a quantity of iron, upon which judgment was entered from which defendant appeals.

The evidence tendered shows that the property in the morning of October 18, 1921, near the corner of 17th street and Lombard avenue, in Baltimore. It appears the defendant railroad constructed at a point further north a spur track in the path of an overhead car, with a trolley railway.

The driver of the wagon was a non union citizen-scab, plaintiff already being one, but it is maintained that even if discovered, the driver, one Anderson, in turning his horses into the track, his negligence caused the damage to the plaintiff. The general rule liability is not applicable to the present circumstances. The evidence shows without controversy that plaintiff was in charge of his wagon and team, and that Anderson drove as directed by him. The wagon was a frame wagon, having dimensions as various points, and plaintiff was hauling lumber like trash. Plaintiff would direct Anderson to the street where delivery was to be made, and when such delivery had been made would tell him where then to go. Immediately before the injury plaintiff had directed Anderson to the northwest and then another direction to the northwest corner of 17th street and Lombard avenue. This

runs east and west, Oglesby north and south. The team had been standing next the curb on 75th street and facing west. Both plaintiff and the driver, Silversdorf, came out of the store and got up on the front seat of the wagon, plaintiff sitting on the left of the driver. Plaintiff looked to the east to see whether any street car was approaching on 75th, and then gave instructions to the driver to "go ahead," that is, to turn around, swinging the horses towards the south and across the track. Silversdorf relied upon the plaintiff as to when and where to drive. Under these circumstances plaintiff was in fact in control of the driver; it was not a case where the driver was in sole charge. If, under these circumstances, the accident was brought about by the negligence of the plaintiff in directing the driver, it was the plaintiff himself who failed to exercise ordinary care for his own safety. This is in accord with what was said in Flynn v. C. C. Ry. Co., 250 Ill. 460.

Did the plaintiff exercise ordinary care, and was the accident caused through the negligence of the defendant as charged in the declaration? The plaintiff says that when he got into the wagon he looked out at the left hand side and saw a street car approaching about 250 feet east of Oglesby, and that then it was he instructed the driver to "go ahead," and that the driver started to swing his horses across the track; that he kept watching the car bearing down upon them until it struck the wagon, knocking both him and the driver out through the front door of the wagon, which turned over. Silversdorf says that after he had been told by plaintiff to go ahead he turned the horses across the track, and as the front wheels just about struck the track he noticed the street car coming about 75 feet east of him;

that when he first noticed the car the horses were facing just about due south, and fearing a collision he "immediately started to get the horses off." While these two witnesses place the approaching car at a point some distance east of Oglesby avenue at the time they started to turn across the track, we are of the opinion that the greater weight of the evidence proves that the car at this time was in the neighborhood of 50 feet away, or near the east line of Oglesby avenue. It would only take a few seconds from the time that plaintiff first saw the car for Silversdorf to turn the horses onto the track, which makes it impossible to credit plaintiff's statement that when he spoke to the driver the car was 250 feet away. Silversdorf himself, testifying on behalf of plaintiff, and who saw the car only a second or two after plaintiff claims to have seen it, places the distance at 75 feet. A number of witnesses, including some people on the street, who were wholly disinterested, testified positively as to the place and speed of the car when the horses turned onto the track; they corroborate the statement of the motorman that as he approached Oglesby the car was running about 10 or 11 miles an hour and that he was ringing his gong; that as his car was about 50 feet from the wagon the driver swung his team right onto the track; that when the horses started to swing he, the motorman, sounded the gong, applied the brakes and reversed the motor, and at the time of the collision was going six or seven miles an hour; the car ran on for some little distance before it stopped.

We hold that the plaintiff in the exercise of ordinary care must have known that if he instructed the driver to proceed across the track a collision would be inevitable, and that he took his chances on the motorman,

by extraordinary effort, being able to stop the car. Such conduct has been held in many cases to be contributory negligence which prevents a recovery. Among such cases are Moreland, Admx., v. Chicago City Ry. Co., 141 Ill. App. 164, and cases cited therein.

We are of the opinion that the motorman did all that he reasonably could be expected to do to avoid the accident; he had no reason to believe that the team would turn suddenly across his track when he was such a short distance away, and the evidence shows beyond question that he did all that he could reasonably do to stop the car but that this was impossible to accomplish before the collision.

An attempt has been made in argument to make much of the conflicting evidence as to the presence of a light upon the street car and the ringing of the gong, both of which elements, under the circumstances, are not of great importance in view of the fact that plaintiff himself admits that he saw the car approaching before the driver of the wagon started to turn into the track. The ringing of the gong or lights upon the car would have given plaintiff no evidence of the approach of the car additional to that he already had through his sight.

We hold that the evidence shows that the conduct of the plaintiff contributed to the accident in question, and that the defendant was not guilty of the negligence charged; hence the judgment is reversed with a finding of fact.

REVERSED.

by ORTOPTIMOTY OF.T.P., being made to view the car. Such conduct has been held in some cases to be particularly negligence which prevents a recovery. Among such cases are Ratzlaff, Inc. v. Chicago Ill. Co., 121 Ill. App. 164, and cases cited therein.

In view of the evidence that the motorman did all that he reasonably could be expected to do to avoid the accident; he had no reason to believe that the car would turn suddenly across his track when he was only a short distance away, and the evidence tends further to show that he did all that he could reasonably do to stop his car but that this was impossible in reasonable safety the circumstances.

It strikes me that were such an argument to make much of the conflicting evidence as to the presence of a light upon the street and the parking of the car, and of which elements, namely the circumstances, the jury of ordinary experience in view of the fact that plaintiff should admits that he saw the car approaching before the action of the motor started to turn into the turnout. The presence of the car or lights upon the car would have given plaintiff no evidence of the movement of the car sufficient to say he already had warning of a right.

We hold that the evidence shows that the proximate of the plaintiff contributed to the accident in question, and that the defendant was not guilty of the wrongful conduct among the judgment is reversed with a finding of fact.

REVERSED.

359 - 23325

FINDING OF FACT.

The court holds that under the evidence plaintiff failed to exercise ordinary care for his own safety, amounting to negligence which caused the accident whereby he was injured, and that defendant was not guilty of negligence causing the accident, as charged in the declaration.

FINDING OF FACT.

The court holds that under the evidence plaintiff failed to exercise ordinary care for his own safety, amounting to negligence which caused his material damage he was injured, and that defendant was not guilty of negligence causing the accident, as stated in the findings.

370 - 23343

20 I A 327

LOUIS WALD,
Appellee,

vs.

MORRIS LILIENTHAL, RUBY BERMAN and HARRY ELISBERG, copartners, trading as LILIENTHAL, BERMAN & ELISBERG,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court for $187.69 in favor of the plaintiff and against the defendants in an action for salary and commissions claimed due under a contract.

The defendants were manufacturers and dealers in ladies' wearing apparel, and plaintiff was employed by them as designer under two written contracts, the first covering the period from August 10, 1914, to January 1, 1915, and the second from the latter date to November 1, 1915. Under the first contract plaintiff was paid a salary of $30 per week and in addition thereto was to receive 1% of the gross amount of goods sold and paid for. Under the second contract he was to receive $40 per week and commission the same as before. Both contracts provided that the commissions were payable upon the expiration of the periods named, on all goods paid for by the purchasers; payment of commission on goods not then paid for to be deferred until such time thereafter as the purchasers settled their accounts. Each contract contained a further provision that in the event plaintiff terminated the agreement by his own action before the date of its expiration he should not receive the 1% commission on the gross sales of defendants.

IN THE HIGH COURT,

Plaintiff,

vs.

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

Defendant.

[illegible] BY THE PLAINTIFF.

This is an appeal from a judgment of the [illegible] Court for plaintiff, in favor of the plaintiff for [illegible] the defendants in an action for injury and consequential damages due solely a contract.

The defendants made counterclaims and [illegible] in lesser sums, but plaintiff was [illegible] by them on [illegible] under its written contracts, the time expiring the period from August 1[illegible], 1[illegible], to January 1, 1[illegible], and the period from the initial date to December 1, 1[illegible]. Under the first contract plaintiff was paid a salary of [illegible] per month and in addition thereto was to receive [illegible] the gross amount of [illegible] paid for. Under the second contract he was to receive [illegible] per month and commissions [illegible] the same as before. Both contracts provided that the [illegible] were results from the negligence of the [illegible] manager, in all cases only for at the [illegible] payment of commissions on [illegible] paid for or be [illegible] than plus [illegible] on the [illegible] salary [illegible]. Each contract contained a [illegible] clause, to the effect [illegible] the event [illegible] terminated the [illegible] if, in the [illegible] before the date of its termination in accordance [illegible] the 12 commissions on the [illegible] [illegible].

Plaintiff continued in this employment until February 24, 1915. Whether he was then discharged, as he claims, or quit his job, as defendants claim, is the question we are asked to determine.

The judgment includes commission admitted to be due plaintiff under the first contract and the sum of $40 as salary for the week ending February 27, 1915. On the day of the severance of their relations, a check, the amount of which is in dispute, but which it seems was intended to cover commission due and two days' salary, was tendered by the defendant Lilienthal to the plaintiff, who refused to accept it. The argument of counsel for defendants is that since plaintiff terminated the contract of his own volition he is entitled to salary for but two days, the actual time he worked during the week in question; while plaintiff insists that because he was discharged defendants are bound to pay him salary of $40 for the entire week ending February 27th.

Several witnesses testified for each side, and the testimony is directly conflicting. The case was tried by the court without a jury, and the trial judge decided that a preponderance of the evidence was with the plaintiff. Upon appeal the finding of the lower court on questions of fact such as are here presented may not be disturbed unless it appears to be clearly and manifestly against the weight of the evidence. Springer v. David Bradley Mfg. Co., 191 Ill. App. 45, and cases cited therein. We have examined the record, and are unable to say that the judgment is not fully warranted by the evidence; it must therefore be affirmed.

AFFIRMED.

377 - 23352

G. FRED SCHORR,
Appellee,

vs.

JOHN T. SHAYNE & CO.,
Appellant.

208 I.A. 328

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to have reversed a judgment against it and in favor of the plaintiff for $1,397.50, rendered in an action of assumpsit for damages on account of breach of contract.

The material facts, about which there is little dispute, are that in April, 1913, the plaintiff, Schorr, was introduced to Roy Shayne, then president of the defendant corporation, while the latter was dining in the Palmer House restaurant, located in the same building as the Shayne establishment. Schorr, an experienced millinery buyer and manager, at the time was out of employment. In the course of conversation Shayne is said to have stated that he was looking for a buyer and manager of their millinery department, which had been operating at a loss, and that someone was needed who could "brace it up and could give us or get us some business." Schorr outlined his previous experience in this work and his qualifications to successfully run the department under consideration. Shayne then suggested that Schorr go into the store and look over the millinery department and let him know what he thought of it. This Schorr did, and returned in about a half hour to the restaurant and there stated his opinions to Shayne.

6. THE QUEEN,
Appellee,

vs.

JOHN T. BUTTS & CO.,
Appellant.

[illegible]

In this appeal the defendant seeks to have reversed a judgment against it and in favor of the plaintiff for $1,247.50, for services in [illegible] statements for the sale of [illegible] of tobacco.

The material facts, about which there is little dispute, are that in April, 1918, the plaintiff, Ducart, was interested in log cutting, [illegible] of the defendant corporation, which [illegible] was doing in the timber [illegible]. Located in the same building as the Butts [illegible], Ducart, an experienced military buyer and auditor, by the [illegible] of employment. In the course of conversation Ducart is said to have stated that he was looking for a buyer and account of their military department. Butts had been operating at a loss, and that company was ready and could "[illegible] it up and make give us a [illegible]." Ducart explained his previous experience in this work and his qualifications to accomplish the [illegible] which [illegible]. Butts then suggested that Ducart go into the [illegible] and look over the military department and it has been [illegible] of it. This Ducart did, and [illegible] in [illegible] the [illegible] and [illegible] to Butts.

Schorr then proposed to take charge of the department from that time, April 10th, until December 1st, at a monthly salary of $250. The testimony of Schorr is that at this point Shayne stated that the proposal was reasonable and agreeable to him, but that he would talk it over with his partners and let Schorr know later in the afternoon; that by appointment they met in the rotunda of the hotel, when Shayne stated, "Everything is all right. I have not a contract written up, but if this is agreeable to you, all right, and we will call it a deal." Schorr commenced work next morning, April 11th.

The testimony further shows that on the afternoon of April 11th a Mr. Austin, one of the officers of the corporation, visited the millinery department and, observing Schorr, wanted to know what he was doing there; Schorr replied that he had been hired by Mr. Shayne to take charge, whereupon Austin stated that the department was a losing venture and "we cannot afford any extra expense." Schorr testified that he then explained his methods and plans to Austin, who finally said, "well, it seems reasonable, and we will try it." About a week later it appears that Austin complained to Schorr with reference to heavy buying while business was quiet, but Schorr's explanation that he had made only moderate and necessary purchases seemed to satisfy Austin. On the day following the latter circumstance, after assigning as his reason the fact that Austin (his father-in-law) was making strenuous objection to the added expense and Schorr's salary, Roy Shayne requested Schorr to draw what money was coming to him from the cashier "and we will call it quits." Schorr thereafter made some attempt to continue his employment under

the contract but found this impracticable, and on the 19th of April, after consulting an attorney, presented to Shayne in person the following letter:

> "I beg to advise you that on the 10th inst. you employed me as general manager and buyer of your millinery department for a period commencing April 11, 1913, and terminating December 1, 1913, at a salary of two hundred and fifty dollars per month. That pursuant to this agreement I entered upon the performance of my duties on the 11th inst., as agreed, and continued until the 18th inst., when, without any just or reasonable cause, you discharged me and notified me that I should not report any further for duty. I desire to advise you that I am ready, willing and able to carry out my part of the contract, as I expressly informed you at the time of my discharge, and shall hold you responsible for all damages which I may sustain by reason of your breach of the contract."

This letter was addressed to the company and signed by Schorr.

Though Schorr seems to have been diligent in his efforts to get other employment, he did not succeed in this until September, 1913; and from April 18th until December 1st received in all for his services the sum of $437.50.

Upon the trial it was shown by the defendant that there was in force at the time of the alleged hiring of Schorr a resolution adopted by the directors of the corporation in February, 1913, as follows:

> "Resolved that William B. Austin be and he is hereby made general manager of the company for the ensuing year; that as such general manager he shall have the supervision of said business and the policy thereof; that he shall confirm all contracts made on behalf of the company for the expenditure of money, or any arrangements made in the taking on or discharging of employes, or in the increase or diminishing of the wages of employes, and that he shall also confirm the amounts of purchase of merchandise, and that he shall be allowed for his services as general manager, in addition to his salary as treasurer, the sum of $2,000 per year."

And the contention of counsel for defendant is that no contractual relation existed between it and Schorr; that although Shayne, on April 10, 1913, was president of the corporation, he had power only to perform the functions of presiding officer

at directors' meetings, and had no authority to make any contract; that since the resolution above quoted vested all such authority in Austin, who took no part in the negotiations with plaintiff, the latter's claim is without merit and untenable.

Many principles are presented and numerous cases cited in the brief of defendant to the effect that the authority of the president of a corporation to act for it may be presumed unless the contrary is shown by the by-laws of the company or resolution of its board of directors. Under certain limitations this is true; such would doubtless be the rule so far as the officers and directors themselves were concerned, and also with respect to others possessing knowledge of such peculiar arrangement. However, as here, where the one dealing with the president knows nothing whatever of the internal regulations of the management affecting employment, and in good faith contracts with the president for his services, it may not later be asserted that a private resolution of the corporation's directors has been violated by the president, that the agreement with the person hired is for that reason ineffective, and that he has no ground for a claim against the corporation because no agreement had been made by which it could be bound. Atwater v. American Exchange Bank, 152 Ill. 605. After considering the details of the meeting and conversation between plaintiff and Shayne which led up to the making of the contract, we are not prepared to say that Schorr in his dealings with Shayne acted otherwise than in good faith.

There was persuasive testimony tending to cast doubt on some of the statements made by the plaintiff, but however this may be, upon the entire record we do not feel inclined to disagree with the conclusion of the trial court.

There is no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

23473

W. A. DAVIS,
Appellee,

vs.

F. J. ROSE,
Appellant.

208 I.A. 329

INTERLOCUTORY APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from an interlocutory injunctional order enjoining the defendant, Rose, from "selling, assigning, leasing or attempting to sell, assign or lease to any person or persons whatsoever the premises" described in the bill of complaint.

The bill alleges a contract between the complainant, Davis, and the defendant, Rose, under which the defendant was to build a garage, in accordance with plans subsequently to be submitted, upon the premises named, and to execute a lease for the same to Davis for a term of ten years; that defendant has failed to submit plans and specifications, and is intending to make another lease to other parties, although the lease contemplated by the contract with defendant has been already executed. The bill asks that the defendant be restrained from canceling said lease or from leasing the premises to any other persons, and that the lease between the complainant and the defendant be declared a valid and existing lease, and that the complainant have right to enter into and acquire full possession and control of the premises; also that the defendant be restrained from selling or assigning the premises, following the language of the injunctional order.

V. A. DAVIS, Applicant,

vs.

E. J. KING, Respondent.

BE. FRANCIS ROBERTS BRIGHTWEN THE CHIEFTAIN OF THE COURT.

This is an application signed from an INTERLOCUTORY injunction under motioning the Attorney, Tom, from "Ali-Ian, mentioned, leaving or bringing to sell, using or loans to any person of pieces whatever the property described in the bill of complaint.

The bill alleges a contract between the complainant, Davis, and the defendant, King, under which the defendant was to build a gallery, in accordance with plans subsequently to be modified, also the premises named, and to execute a lease for the same to Davis for a term of ten years; that defendant has failed to submit plans and specifications, and is intending to make another lease to other parties, although the lease contemplated by the contract with defendant has been already executed. The bill asks that the defendant be restrained from executing said lease or from leasing the premises to any other person, and that the lease between the complainant and the defendant be declared a valid and subsisting lease, and that the complainant have right to make this and receive full possession and control of the premises; also that defendant be restrained from making or receiving any offers, following the language of the INTERLOCUTORY order.

The order of injunction was granted without notice. This alone is a sufficient reason for a reversal. Notice is mandatory under the statute except where from the bill and affidavit it appears "that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice." No such facts appear. The bill alleges only a disposition on the part of the defendant to default in performance of the contract with complainant and an intention to deal with other parties. The affidavit asserts only a conclusion that complainant's rights would be prejudiced. It has been held frequently that to justify the issuance of an injunction without notice it is not sufficient to state conclusions of prejudice, but facts must be stated from which the court can draw the conclusion that an immediate injunction without notice is necessary to save complainant from harm. The injunction was improperly ordered. Leiter v. Baude, 99 Ill. App. 64.

The bill in effect seeks the specific performance of a contract for the construction of a building which involves the preparation of plans and specifications. We know of no precedent nor of any equitable principle which would require a court to prepare such plans and specifications or to enter into the work of supervision of the construction of a building in accordance therewith.

The bill also seeks to have a court of chancery deliver to complainant possession of the premises described in the lease from the defendant. That such possession can be properly sought only in a suit at law would seem to admit of no argument.

Other points presented in argument may be considered by us in the event we shall be called upon to pass on a

The order of injunction has granted without notice. This alone is a sufficient reason for a reversal. Notice is mandatory under the statutes cited above from the writ and affidavit it appears that the rights of the employees not will be seriously prejudiced if the injunction is not issued immediately on ordinary notice." In such cases appeal. The bill alleges only a difficulties in the pay of the defendant to default in performance of the contract with employees and we fairness be done with other workers. The affidavit answers only a questions that contractual rights would be prejudiced. It has been also frequently that to justify the issuance of an injunction without notice it is not sufficient to state conclusions of pleading, but there must be a clear type that the facts and show the existence that an immediate injunction without notice is necessary to save irreparable from loss. The injunction was improvidently issued. Lawton v. Steele, 84 Cal. 444.

The bill in effect seeks the specific performance of a contract for the employment of a building which involves the physicality of time and quantities. We have of no precedent for any equitable principle which would require a court to review such plans and specifications as it notes into the work of supervision of the construction of a building in accordance therewith.

The bill also seeks to enjoin of damage delivery to complainant pressure of the premises described in the lease from the defendant. That such possession may be gained through with in a bill of law would seem to be out of no argument.

Clear rights granted to equities may be enforced by us in the court no doubt to which upon to pass on a

final decree.

The order granting the injunction is reversed.

REVERSED.

23603

THE GAELIC PARK ATHLETIC CLUB,
a corporation,
Appellee,

vs.

J. K. FIELDING and JOHN FIELDING,
Appellants.

208 I.A. 331

APPEAL FROM INTERLOCUTORY ORDER, CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from an order granting a temporary injunction restraining them from interfering with the complainant, its officers, agents or servants, in conducting entertainments, athletic games or other amusements, upon the premises at 47th street and California avenue, in Chicago, and from interfering in the collection of entrance fees and sums for concessions, and all other sums due complainant from the operation of its business upon said premises.

The bill alleges that a number of persons, including the two defendants, organized an athletic club under the name of complainant, for the purpose of giving entertainments upon the premises above described, which were leased from the owner, who is not a party to this controversy. Because of some troubles which the landlord had previously had with a similar organization, he desired that the lease for the year 1913 be made in the name of an individual but for the benefit of complainant; that the officers of the complainant agreed with J. K. Fielding, one of the defendants, that he would take the lease in his name for the use and benefit of the organization, and this was done each year until 1917; that during all this time the

THE COURT AND ATTORNEY GENERAL,
a corporation,

Appellees,

vs.

A. E. FIELDING and JOHN BLANKER,
Appellants.

MR. JUSTICE BRANDEIS DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from an order granting a temporary injunction restraining them from interfering with the contractors, the officers, agents or servants, in constructing substructures, abutments or other accessories, upon the premises at 47th street and California avenue, in Chicago, and from interfering in the collection of contracts from and made for concessions, and all other acts for obstructing the operation of the business upon said premises.

The bill alleges that a number of persons, including the defendants, engaged as stevedores and longshoremen upon the docks of Chicago, for the purpose of giving employment upon the premises above described, men were hired from the union, but in lieu of a permit to this authority. Because of some difficulties which the defendants had previously had with a similar organization, he desired that the issue for the year 1919 be made by the head of an independent and the results of negotiations; but the officers of the complainant unions with A. E. Fielding, one of the defendants, that he would take the issue in his own for the use and benefit of the organization, and this was done each year until 1919; that during all this time the

rent for the premises required by the lease was paid out of the funds of the complainant, and also the rent under the lease made in 1917, and that J. K. Fielding never paid from his own funds any part of the rent; that during all this time and to the date of the filing of the bill, which was July 20, 1917, the complainant operated and controlled the business and entertainments of the complainant upon the premises; that it charged admission fees and granted concessions for the sale of food and refreshments, and from the income so obtained it defrayed the expenses and costs of maintaining and operating the business. The bill alleges that since 1914 J. K. Fielding, by some private arrangement, allowed concessions to his brother, John Fielding, whereby John Fielding failed to pay a reasonable sum for these privileges, and that both defendants made personal profits thereby and failed to account.

Complainant contends that J. K. Fielding holds the lease in trust for the complainant, and asks that a constructive or resulting trust may be decreed by the court; also that the lease be reformed and that it be assigned to the beneficial owner, the complainant.

Counsel for the defendants have presented argument in full, as if this were an appeal upon a final decree. We are not of the opinion that it is necessary in disposing of this interlocutory appeal to consider the points thus raised. It is only necessary at the present time to consider whether or not the court properly has assumed jurisdiction and, if so, whether there was an abuse of discretion in granting the injunction.

We think it is self evident from the facts stated in the bill that the subject-matter is properly before the court for equitable disposition. It has been held many

rule for the problem presented by the James and Lange set of the theory of the emotions, and also the part under the James rule in 1917, and that i. e. Sherlock never pull from his own funds any part of the rent; that during all this time and to the date of the filing of the bill, which was July 20, 1917, the complainant operated and controlled the business and notwithstanding of the covenants made the premises; that it changed admission fees and charged admissions for the sale of foot and refreshments, and from the income so obtained it defrayed the expenses and costs of maintaining and operating the business. The bill alleges that since 1916 i. e. Sherlock, by some private arrangement, altered conditions in his favour, some thinking, thereby this Sherlock failed to pay a treasurer's and the taxes payable, and that both defendants made personal profits thereby and failed to account.

Complainant contends that i. e. Sherlock held the lease in trust for the complainant, and also that a constructive or resulting trust may be imposed by the court; also that the lease be returned and that it be assigned to the beneficial owner, the complainant.

Counsel for the defendants have presented argument in full, and it will suffice to repeat upon a final hearing, to use not of the rights that it is necessary to dispense of this interlocutory appeal to consider the points that relief. It is only necessary at the present time to consider whether or not the court properly has assumed jurisdiction and, if so, whether there was no abuse of discretion in granting the injunction.

It seems it is not evident from the bill that the complainant is entitled to equity before the court for material discretion. It has been held many

times under similar circumstances that it is proper for a court in the exercise of its equitable powers to declare a resulting or constructive trust, and having taken jurisdiction for this purpose we can see no reason why it should not retain jurisdiction for the purpose of determining all the rights of the parties.

We cannot say that the court improperly exercised its discretionary power in granting the order appealed from. The order should be affirmed unless its impropriety is clearly made to appear. Upon the allegations made in the bill the court was abundantly justified in entering the injunction, and in so doing the discretionary powers of the chancellor were not abused. Ziankos v. Hellenic Orthodox Church, 170 Ill. App. 334.

AFFIRMED.

Since under similar circumstances that is is illegal for a state to use the exercise of its sovereign powers to impose a penalty or constructive fraud, the Supreme Court held, in this instance to be one as to result and it would not retain jurisdiction for the purpose of protecting all the rights of the parties.

We cannot say that the court improperly exercised its discretionary power in granting the order appealed from. The order should be affirmed unless its jurisdiction is clearly made to appear. Upon the allegations made in the bill the court was abundantly justified in retaining the jurisdiction, and in so doing the interlocutory decree of the commissioner was not erroneous. Jackson v. Pacific Express Co., 175 Ill. App. 314.

AFFIRMED.

41 - 23340

MARGARET ANN BONNET,
Plaintiff in Error,

vs.

JOHN HOBRECKER, Jr.,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

208 I.A. 332

PER CURIAM.

Defendant in error files his motion to strike from the record portions of the transcript filed herein, and to affirm the judgment. The transcript includes the praecipe, summons and return thereon, appearances, pleas, certain substitutions of attorneys for both parties, an order continuing the case entered January 5th, 1917, and an order entered January 17th, 1917, dismissing the suit for want of prosecution. There is also included a notice of a motion to set aside the order of dismissal, an affidavit in support of the same, and an order denying the motion.

It is clear that the motion to vacate the order of dismissal and the notices and affidavit relating thereto are not a part of the common law record, and the ruling of the court on the motion cannot be preserved for review without a bill of exceptions. As the plaintiff in error has presented no suggestions in opposition to the motion to dismiss the writ of error, and as the record presents nothing upon which an assignment of error can properly be made, we are of the opinion that this suit in which the writ of error was sued out in this court must be and therefore is dismissed.

SUIT DISMISSED.

61 - 32940

ANDREW AND MARGARET, Plaintiffs in error,	
vs.	
JOHN MCKNIGHT, et al., Defendant in error.	

PER CURIAM.

Defendant in error files his motion to strike from the record portions of the transcript filed herein, and to affirm the judgment. The transcript includes the pleadings, summons and return thereon, appearance, plea, certain substitutions of attorneys for both parties, an order entered the 2nd of August January 8th, 1917, and an order entered January 17th, 1917, dismissing the suit for want of prosecution. There is also included a notice of a motion to set aside the order of dismissal, an affidavit in support of the same, and an order denying the motion.

It is clear that the notice to vacate the order of dismissal and the notice and affidavit relating thereto are not a part of the common law record, and the ruling of the court on the motion cannot be preserved for review without a bill of exceptions. As the transcript is error the presented no suggestion in opposition to the motion to dismiss the writ of error, and as the record presents nothing upon which an assignment of error can properly be made, we are of the opinion that this suit in which the writ of error was sued out in this court must be and therefore is dismissed.

DIS: STRICKLAND.

R A Dun Oct 3/17

208 I.A. 337

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6343

Jessie F. Kline, appellee

208 I.A. 337

vs

Appeal from City Court Sterling.

City of Sterling, appellant.

Nichaus. P. J.

This is an appeal by the city of Sterling, from a judgment for $475, rendered against the appellant, in the city court of Sterling, in favor of Jessie Kline, F. Kline, in the prosecution of an action on the case, for personal injuries. The negligence charged against the appellant, in the declaration upon which a recovery was had, is contained in the averments, that the city of Sterling had carelessly constructed a bridge over the gutter on the northwest corner of East Third Street and First Avenue; and had carelessly allowed this bridge to be and remain out of repair.

The evidence shows that the bridge over the gutter in question, is an iron crossing plate; and this crossing plate is eighteen inches wide, and seven feet long; it is perforated with holes three eighths of an inch in size, having a smooth surface except that there are three rows of raised letters on it, one and one half inches long, grouped together to make the words: "Made in Twin City Foundry Co. Sterling." These letters had been somewhat worn off at the edges and made smooth by constant use.

The crossing plate in question, and other similar plates had been in general use in the City of Sterling, for the purpose of bridging gutters, for ten or twelve years. There is no evidence in the record from which the inference could be reasonably drawn, that the crossing plate in question had been negligently constructed, or allowed to remain out of repair; or that it was not safe under ordinary conditions. The proof shows, that on

Gen. No. 6315

Jessie P. Kline, respondent

vs

City of Stirling, appellant.

Appeal from City Court Stirling.

Mitchell, P. J.

This is an appeal by the city of Stirling, from a judgment for $475, the jury rendered the verdict, in the city court of Stirling, in favor of Jessie Kline, J. Kline, in the accident of an action on the case. The pleaded injuries. The negligence charged against the appellant, in the declaration upon which a recovery was had, is substantially as follows, that the city of Stirling had negligently constructed a bridge over the water on the northwest corner of Park Street and First Avenue; and had negligently allowed this bridge to be and remain out of repair.

The evidence shows that the bridge over the water in question, is an iron crossing plate; and this crossing plate is eighteen inches wide, and seven feet long; it is perforated with holes three eighths of an inch in size, having a smooth surface except that there are three rows of raised inches on it, six and one half inches long, placed together to make the words "Made in this city Foundry St. Stirling." These letters had been somewhat worn off at the edges and made smooth by wear that was.

The crossing plate in question, and other similar plates had been in general use in the city of Stirling, for the purpose of bridging gutters, for two or twelve years. There is no evidence in the record from which the inference would be reasonably drawn, that the crossing plate in question had been negligently constructed, or allowed to remain out of repair; or that it was not safe under ordinary conditions. The proof shows, that c

November 22, 1915, the appellee started down town from her home, and it commenced to snow; that when she got to the corner in question, she crossed over on the crossing plate, and near the end of the plate, next to the pavement, she slipped and fell and thereby broke her arm. And the cause of appellee's fall and Injury is not a matter of conjecture or inference, but is clearly stated by her, in her testimony. She says: "I knew I was walking along very carefully because it was snowing, but as I stepped on that thing, the iron was slippery with the snow and I went down." That is to say, she fell down and broke her arm because the falling snow had made the crossing plate slippery, and the slippery condition of the crossing plate, consequent upon the falling snow, caused her to fall.

A city is not liable because its streets or walks, or crossings get slippery on account of a snow fall. The language of the supreme court in City of Chicago v McGibben 78 Ill. 347, bears directly upon this point; "It appears from the evidence that a piece of glass some 22 by 24 inches a heavy piece of plate glass was inserted in the sidewalk. This glass was placed in the sidewalk for the purpose of affording light to the area under the same; on this glass, it is alleged that appellee slipped and fell. * * * * A number of witnesses were produced by plaintiff. who gave testimony tending to show, that the piece of glass was smooth, slippery, etc. * * * * There had been a light fall of snow during the evening. The appellee slipped upon the glass. The mere slipperiness of a sidewalk occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not such a defect as will make the city liable for damages occasioned thereby."

The rule announced in the foregoing case, is again reiterated in City of Chicago v Vixby, 84 Ill. 83. In that case the party

November 22, 1911. The complaint stated that plaintiff was
bore, and it occurred to many [illegible] in the [illegible]
in question, she crossed over on the crossing plate. As she
the rail of the plate, went to the pavement, she slipped and fell
and thereby broke her arm. All the issue of defendant's fail and
injury is not a matter of negligence or inference, but is
clearly stated by her, in her testimony. She says: "I was
walking along very carefully because it was snowing, and
as I stepped on that thing, the iron was slippery and she
and I went down." That is to say, the fall was not because
she because the falling snow had made the crossing plate
slippery, and the slippery condition of the crossing plate,
consequent upon the falling snow, caused her to fall.

A city is not liable because its sidewalks or crossings
stage not slippery on account of a snow fall. The language of
the supreme court in City of Chicago v Bohlsen 74 Ill. 247,
bears directly upon this point: "It appears from the evidence
that a piece of glass was set up by the house a short piece of
plate glass was inserted in the sidewalk. This glass was placed
in the sidewalk for the purpose of allowing light to the
area under the same; on this glass, it is alleged that accident
happened and fell. * * * A number of witnesses were produced
by plaintiff. One gave testimony tending to show, that the
piece of glass was smooth, slippery, etc. * * * There had
been a light fall of snow during the evening. The superior
slipped upon the glass. It was slipperiness of a sidewalk
occasioned by ice or snow, not being accumulated so as to
constitute an obstruction, is not such a defect as will
make the city liable for damages consequent thereon."

The rule announced in the foregoing case, is again reiterated
in City of Chicago v Kiley, 84 Ill. 92. In that case the party

injured slipped and fell on a step, at a crossing; and the Court held: "The city was bound only to the exercise of reasonable ~~care~~ prudence and diligence in making this step. It is not required to foresee and provide against every possible danger or accident that may occur. It is not an insurer against accident, but only required to keep its streets and sidewalks in a reasonably safe condition for the accommodation of travelers and pedestrians; and we are of opinion, that the City has not failed in its duty in this instance. * * * * There was ice on the step, as appellee swears, and if so, all parts of the walk are dangerous, unless extraordinary care is taken by the persons passing over it. We think the evidence shows, that the fall was the result of an accident occasioned by the ice, and not from a defective condition of the walk; if the sidewalk is safe under ordinary conditions, the City is not liable because it is rendered slippery by snow or ice."

This Court held, in City of East Dubuque v Brugger, 118 Ill. App. 421 that the city of East Dubuque was not liable because the fall of a party injured in that case, was caused by the slippery condition of a walk which had resulted from the weather.

According to the well settled rule, as announced in the foregoing decisions, it is apparent that appellee, from her own testimony, has no cause of action against appellant. The judgment is therefore reversed.

Judgment reversed.

Finding of facts to be incorporated in the judgment. That the appellant was not guilty of any negligence which caused or contributed to the injury of appellee.

injured slipped and fell on it. In affirming, the Court said: "The city was bound only to the exercise of reasonable care, prudence and diligence in making its survey. It is not required to foresee and provide against every possible danger or accident that may occur. It is not an insurer against accident, but only required to give its streets and sidewalks in a reasonably safe condition for the accommodation of travelers and pedestrians; and in its opinion, that the City has not failed in its duty in this instance. * * * There was loss on the step, as stated above. But it is, all parts of the walk are dangerous, unless extraordinary care is taken by the person passing over it. In view of the evidence above, that the fall was the result of an accident occasioned by the rain, and not from a defective condition of the walk; if the sidewalk is safe under ordinary conditions, the City is not liable because it is rendered slippery by rain or ice."

This Court held, in City of Fort Dodge v Trumper, 112 Iii. App. 421 that the duty of Fort Dodge was not liable because the fall of a party injured in that case, was caused by the slippery condition of a walk that resulted from the weather.

According to the well settled rule, as announced in the foregoing decisions, it is apparent that appellee, from her own testimony, has no cause of action against appellant.

The judgment in therefore reversed.

Judgment reversed.

Finding of facts to be incorporated in the judgment.

That the appellant was not guilty of any negligence which caused or contributed to the injury of appellee.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this day of_____in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

R H Dec July 31/17

3559

208 I.A. 338

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 1 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6366

Robert Schultz, &c. appellee 208 I.A. 338

vs Appeal from Will.

Aurora, Plainfield & Joliet

Ry. Co. appellant.

Niehaus, P. J.

In this case Robert Schultz, by Sylvester Schultz his father and next friend, sued to recover for injuries resulting from being struck by a street car of the Aurora, Plainfield and Joliet Railway Company, appellant. The suit was brought in the circuit court of Will County, and a jury trial was had, and a verdict for appellee, for $4,000. Appellee entered a remittitur, reducing the amount of the damages found by the jury, to $3500, for which amount judgment was entered against the appellant; and this appeal is prosecuted from the judgment.

The accident, in which appellee, then a child of about two years of age, was injured, occurred on August 1, 1914, on Granite Street, near the corner of Cora Street, in the outskirts of the city of Joliet. Granite Street runs east and west; and is intersected by Center Street, about 318 feet west of Cora Street. The street car tracks of appellant are located on the southerly side of Granite Street.

On the day in question, about five o'clock in the afternoon appellant's street car, which caused the injury, was running on Granite street towards Cora Street. The child in question was in the street, near the house where it lived, and near the corner of Granite and Cora Streets. According to the testimony of the motorman who was in control of the car, he observed the child immediately after leaving Center Street, and when he first saw it, it was sitting down playing in a sand pile on the northerly side of the street. The child got up, as the car was

Gen. No. 8808

208 I.A. 338

Robert Sonnite, &c. appellees

vs

Appeal from Will.

Aurora, Plainfield & Joliet

Ry. Co. appellant.

Mr. Justice P. J.

In this case Robert Sonnite, by Plaintiff, sued his father and next friend, sued to recover for injuries resulting from being struck by a street car of the Aurora, Plainfield and Joliet Railway Company, appellant. The suit was brought in the circuit court of Will County, and a jury trial had, and a verdict for appellee, for $4,000. Appellee entered a remittitur, reducing the amount of the damages from $ xxx by the jury, to $2,000, for which amount judgment was entered against the appellant; and this appeal is prosecuted from the judgment.

The accident, in which appellee, then a child of about two years of age, was injured, occurred on August 1, 1914, on Granite Street, near the corner of Cora Street, in the suburbs of the city of Joliet. Granite Street runs east and west; and is intersected by Center Street, about 215 feet west of Cora Street. The street car tracks of appellant are located on the southerly side of Granite Street.

On the day in question, about five o'clock in the afternoon appellant's street car, which caused the injury, was running on Granite street toward Cora Street. The child in question was in the street, near the house where it lived, and near the corner of Granite and Cora Streets. According to the testimony of the motorman who was in control of the car, he observed the child immediately after leaving Center Street, and when he first saw it, it was sitting down playing in a sand pile on the northerly side of the street. The child got up, as the car was

approaching, and then moved toward the street car tracks. The motorman testified on this point, as follows: "After I discovered that the child was standing up, I saw it stand for a while, and then ran across the street to the south, and a little bit west." The motorman says that the child ran, but the weight of the evidence is clearly to the effect, that it walked, or "toddled" toward the tracks, like a two year old child naturally would.

Appellant contends, that the evidence does not show, that the motorman was guilty of any negligence; and this is the vital question in the case. From a careful reading of the testimony in the record, we conclude that it is sufficient to sustain the inference which the jury probably drew from the evidence, that the motorman, in his management of the car, was not as prompt in his efforts to stop the car, to prevent it from injuring the child, as he could and should have been, in the exercise of reasonable care for the child's safety. His own testimony upon this point, is so contradictory, that the jury probably placed very little reliance upon it. For instance, as to how near he was to the child, when he shut off the power, he says in one part of his testimony: "I was probably 120 feet east of Center Street, when I turned the power off" (this would be about 180 feet from the place where the accident occurred.) Then directly contradicting this statement, in another part of his testimony, he says: "I didnt shut ~~mxx~~ the power off * * * * *120 feet east of Center Street. I shut it off * * * 200 feet from the crossing." and finally he says: "When I shut off the power 125 feet east of Center Street, the child was right in the same place and had not moved from the time I left Center Street."

As to the time when he put on the brakes, and the reverse, his testimony is equally contradictory. He says in one place, that he started to stop the car immediately when the child got

approaching, and then moved forward to attract our attention. The motorman testified on this point, as follows: "Although I observed that the child was standing up, I saw it stand for a while, and then ran across the street to the north, and I hitted it." The motorman says that the child ran, but the weight of the evidence is clearly to the effect, that it walked, as "walking" suggests the trucks, like a two year old child naturally would.

Appellant contends, that the evidence fail to show, that the motorman was guilty of any negligence; and this is the vital question in the case. From a careful reading of the testimony in the record, we conclude that it is sufficient to sustain the inference which the jury probably drew from the evidence, that the motorman, in his management of the car, was not as prompt in his efforts to stop the car, to prevent it from injuring the child, as he could and should have been, in the exercise of reasonable care for the child's safety. His own testimony upon this point, is so contradictory, that the jury probably placed very little reliance upon it. For instance, in one place he was to the child, "when he shut off the power, he says in one part of his testimony: "I was probably 150 feet east of Center Street, when I turned the power off" (this would be about 120 feet from the place where the accident occurred.) Then directly contradicting this statement, in another part of his testimony, he says: "I did not shut the power off * * * * 150 feet east of Center Street. I shut it off * * * 200 feet from the crossing." And finally he says: "When I shut off the power 150 feet east of Center Street, the child was right in the same place and had removed from the time I left Center Street."

As to the time after he put on the brakes, and to stop the car, his testimony is equally contradictory. He says in one place that it started to stop the car immediately when the child put

up. This is his language: "Right after I seen the child get up, I threw the ~~xxxx~~ power off. I put the brakes on first. I turned the power off, tightened up the brake, then I reversed and put the power into her om the reverse." In another part of his testimony, however, he says, that he did not put on the brakes until the child started to cross the street, and uses this language: "As soon as the child started across the street, I started to stop my car. I twisted up the brake as hard as I could, and then pulled the reverse. * * * * I hollered to the kid to go back; I dont know just what I said: I rang the gong; I think I said 'Get out', or 'Look out'. I couldnt say for sure whether I hollered once or more than once."

The proof introduced by appellant, shows that this car, which the motorman says, was going at the rate of eight miles an hour, could have been stopped within at least 50 feet. Anton strmec testified that when he heard the motorman "holler" at the child, the car wasstill 75 feet from the place where the accident ~~xxxxxxxx~~ occurred. According to this testimony, if the motorman had started to stop his car when he commenced hollering at the child, the car would not have come within 25 feet of striking the child.

Antonia Strametz corroborates Strmec, with reference to the time which must have elapsed after the "hollering", and before the child was struck. She testified, that just before the accident, she was at work in her house, which faces Coar Street; that she heard the motorman "holler"; and that after he had "hollered" three times, "Get out", or "Get out of the way", she went to the window to look out; and when she looked out in the direction of the coming car, she saw the child that the child had not yet reached the street car track, and was walking towards it, while the motorman was still "hollering" and the child kept on walking, and the motorman kept on hollering;

up. This is his language: "Right after I saw the child jump up, I threw the power off. I put the brakes on first. I turned the power off, tightened up the brake, then I reversed and put the power in her on the reverse." In regular part of his testimony, however, he says, that he did not put on the brakes until the child started to cross the street, and uses this language: "As soon as the child started across the street, I started to stop my car. I tried to put the brake as hard as I could, and then pulled the reverse. * * * I hollered to the kid to go back; I don't know just what I said: I rang the bell; I think I said 'Get out', or 'Look out'. I couldn't say for sure whether I hollered once or more than once."

The proof introduced by defendant, showed that this car, which the motorman says, was going at the rate of eight miles an hour, could have been stopped within at least 30 feet. Witnesses testified that when he heard the motorman "holler" at the child, the car measured 75 feet from the place where the accident occurred. According to this testimony, if the motorman had started to stop his car when he commenced hollering at the child, the car would not have gone within 45 feet of striking the child.

Antonia Stramata corroborates Irene, with reference to the time which must have elapsed after the "hollering", and before the child was struck. She testified, that just before the accident, she was at work in her house, which faces Court Street; that she heard the motorman "holler"; and that after he had "hollered" three times, "Get out", or "Get out of the way", she went to the window to look out; and when she looked out in the direction of the coming car, she saw the child; that the child had not yet reached the street car track, and was walking towards it, while the motorman was still "hollering" and the child kept on walking, and the motorman kept on hollering;

and finally the child got to the street car track, and crossed over to the other side, and almost cleared the car before it was struck. When it was found it was lying near the back wheels of the car; so that the car must have gone about 30 feet after the child was struck, before the motorman succeeded in stopping it; which clearly indicates, that he did not commence his efforts to stop the car ~~till~~ until it was within about 30 feet of the child; although he saw the child as the car was approaching for a distance of 350 feet; and kept his eyes on it most of the time.

The inference from the testimony is irresistable, that the motorman relied first upon the warnings which he gave, to prevent injury to the child,- the ringing of the gong, and yelling at the child, and then, when he found they were not effective, that he resorted to the efforts to stop the car. In this instance, warnings served no useful purpose. The victim of the accident, was a child of such tender years that in the natural order of things, it would be wholly without julgment, and without knowledge or appreciation of the purpose of the warnings; nor could it have had any understanding whatever, about the significance of the ringing of the gongs, or the shouts of the motorman; and it could not have realized the effect of the speed of the car, or the dangers that might result therefrom.

Appellant also ~~insists~~ insists that the amount of the damages is excessive. The evidence shows, that the injury resulting to the child was not only severe, but entailed long and continued suffering; and that in some respects it is permanent in its character. Charles Walters, a witness for appellee, testified in reference to the injuries, as follows: "The right hip was mangled; the flesh all torn away, and the skin hanging. Dr. Patterson came, looked at the wound, and took his scissors

and finally the child got to the street car track, and crossed over to the other side, and almost injured the car before it was struck. When it was found it was lying near the south side of the car; so that the car must have gone about 30 feet after the child was struck, before the motorman succeeded in stopping it; which clearly indicates, that he did not immediate the efforts to stop the car until it was within about 30 feet of the child; although he saw the child in the car was approaching for a distance of 300 feet; and that it was in view of it all the time.

The inference from the testimony is irresistible, that the motorman relied upon the warnings which he gave, to prevent injury to the child,- the ringing of the gong, and yelling at the child, and then, when he found they were not effective, that he resorted to the efforts to stop the car. In this instance, warnings served no useful purpose. The victim of the accident, was a child of seven tender years that in the natural order of things, it would be wanting without judgment, and without knowledge or appreciation of the purpose of the warnings; nor could it have had any understanding whatever, about the significance of the ringing of the gong, or the shouts of the motorman; and it could not have realized the effect of the speed of the car, or the dangers that might result therefrom.

Application of the facts indicate that the amount of the damages is excessive. The evidence shows, that the injury resulting to the child was not only severe, but painful long and protracted suffering; and that it has been responsible in a measure in its character. Dr. Fatterson says, a witness for appellee, testified in reference to the injuries, as follows: "Her right hip was mangled; the flesh all torn away, and the skin mangled. Dr. Fatterson says, looked at the wound, and that his opinion

and cut away the flesh and the skin that was hanging." So severe was the injury that the child needed the constant attention of a physician for three months, and skin grafting had to be resorted to in endeavoring to bring about a healing of the wounds. Dr. Patterson, the attending physician, testified that the injury resulted in an open bloody wound; that there were several cuts in the thigh, a long one, and a short one, about 7 inches up and down the thigh; and a transverse cut about 6½ inches across; and several smaller cuts; that the whole hip and skin were cut into little pieces; that he sewed the parts together with 38 stitches in all the cuts; that he dressed the wounds every day for about 3 months; that the child "hollered and yelled" from the pain, for a long time. The child was unable to walk for four or five months after the accident; and the placeof the injury on the body is now covered with scar tissue, and will not regain a norman condition.

We conclude, therefore, that the amount fixed in the judgment is not excessive, considering the grave character of the injuries as described by these witnesses.

The judgment is affirmed.

Judgment affirmed.

and cut away the flesh and the skin that was hanging." The severe was the injury that the child sustained by permitting attention of a physician for three months, and this practicing had to be resorted to in endeavoring to bring about a healing of the wounds. Dr. Patterson, the attending physician, testifies that the injury resulted in an open bloody wound; that there were several cuts in the thigh, a long one, and a short one, about 7 inches up and down the thigh, and a transverse was about 6½ inches across; and several smaller cuts; that the whole hip and skin were cut into little pieces; that he sewed the parts together with 32 stitches in all the cuts; that he dressed the wounds every day for about 3 months; that the child "hollered and yelled" from the pain, for a long time. The child was unable to walk for four or five months after the accident; and the place of the injury on the body is now covered with scar tissue, and will not regain a normal condition. We conclude, therefore, that the amount fixed in the judgment is not excessive, considering the grave character of the injuries as described by these witnesses.

The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

P N Dec. Oct 3. 1917

208 I.A. 339

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 19 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen.No. 6373.

Richard Farnsworth,

Plaintiff in error 208 I.A. 339

vs Error to LaSalle.

William Gromm,

Defendant in error.

Niehaus, P. J.

Richard Farnsworth, the plaintiff in error, on December 17 1912, entered into a contract, in the form of articles of agreement, with the defendant in error, William Gromm, concerning the conveyance by the plaintiff in error, of certain real estate conditioned upon the payment by the defendant in error, of the consideration of $12,000. specified in said articles of agreement, which was to be made in the following manner: $2,000 was to be paid to Mabel Pickens, who had a mortgage on the premises for that amount; and the balance of $10,000 was to be paid on or before ten years from March 1, 1913, with interest at the rate of five per cent per annum, payable semi-annually, on September 1, 1913, and March 1, 1914; and on corresponding dates of each year, until the principal sum was paid; all taxes assessed against the real estate in question after the year 1912, were to be paid by the defendant in error.

It was provided in the contract, that the defendant in error should have the right to make payments, on any interest paying date, upon the principal sum of $10,000 in any amount which would be a multiple of $100; and that as soon as the purchase price was reduced by payments, to $6,000, the plaintiff in error bound himself to execute a warranty deed for the premises and take a mortgage or trust deed for the unpaid remainder.

The contract also stipulated, that possession of the real estate in question, should be delivered by the plaintiff in error to the defendant in error, on March 1, 1913, and that "in case

Gen.No. 8375.

Richard Farnsworth,

Plaintiff in error,

208 I.A. 339

vs

Error to LaSalle.

William Cromm,

Defendant in error.

Mishaus, P. J.

Richard Farnsworth, the plaintiff in error, on December 17 1913, entered into a contract, in the form of articles of agreement, with the defendant in error, William Cromm, concerning the conveyance by the plaintiff in error, of certain real estate conditioned upon the payment by the defendant in error, of the consideration of $12,000, specified in said articles of agreement, which was to be made in the following manner: $2,000 was to be paid to Mabel Pickens, who had a mortgage on the premises for that amount; and the balance of $10,000 was to be paid on or before ten years from March 1, 1913, with interest at the rate of five per cent per annum, payable semi-annually, on September 1, 1913, and March 1, 1914; and on corresponding dates of each year, until the principal sum was paid; all taxes assessed against the real estate in question after the year 1913, were to be paid by the defendant in error.

It was provided in the contract, that the defendant in error should have the right to make payments, on any interest paying date, upon the principal sum of $10,000 in any amount which would be a multiple of $100; and that as soon as the purchase-price was reduced by payments, to $2,000, the plaintiff in error bound himself to execute a warranty deed for the premises and take a mortgage or trust deed for the unpaid remainder.

The contract also stipulated, that possession of the real estate in question, should be delivered by the plaintiff in error to the defendant in error, on March 1, 1913, and that "in case

of the failure of the defendant in error to make the payments or any part thereof, or perform any of the covenants to be performed on his part, then the contract should, at the option of the plaintiff in error, be forfeited and determined; and the defendant in error should forfeit all payments made by him on the contract; and that such payments should be retained by the plaintiff in error, in full satisfaction and in liquidation of all damages by him sustained; and that he should also thereupon have the right to re-enter and take possession of the premises in question."

It appears from the evidence, that the defendant in error went into possession of the premises mentioned, under this contract; and that he held possession of the same for a year; but failed to make the payments which he had agreed to make, by the terms of the contract, except that he paid $300. interest which became due September 1, 1913; and he did not pay the taxes assessed against the premises in the year 1912. The plaintiff in error thereupon exercised his right and option under the contract, and forfeited the same; and ordered the defendant in error to leave the premises, which he did; and thereupon, the plaintiff in error re-possessed himself of the premises. Thereafter, the plaintiff in error commenced this suit in assumpsit, against the defendant in error, to recover damages resulting to him because of the failure of the defendant in error to comply with the terms of the contract in question.

The declaration filed in the case consists of three counts; the first and second counts being based upon the contract in question, and set out the contract; they aver the obligation of the defendant in error to make the payments stipulated in the contract to be made by him; and that he failed to make the same. also aver that by reason of his default, the plaintiff in error has the right to recover for the use and occupation

of the failure of the defendant in error to make the payment or any part thereof, or perform any of the covenants to be performed on his part, then the contract should, at the option of the plaintiff in error, be forfeited and determined; and the defendant in error should forfeit all payments made by him on the contract; and that such payments should be retained by the plaintiff in error, in full satisfaction and in liquidation of all damages by him sustained; and that he should also thereupon have the right to re-enter and take possession of the premises in question."

It appears from the evidence, that the defendant in error went into possession of the premises mentioned, under this contract; and that he held possession of the same for a year; but failed to make the payments which he had agreed to make, by the terms of the contract, except that he paid $300. interest which became due September 1, 1913; and he did not pay the taxes assessed against the premises in the year 1913. The plaintiff in error thereupon exercised his right and option under the contract, and forfeited the same; and ordered the defendant in error to leave the premises, which he did; and thereupon, the plaintiff in error re-possessed himself of the premises. Thereafter, the plaintiff in error commenced this suit in assumpsit, against the defendant in error, to recover damages resulting to him because of the failure of the defendant in error to comply with the terms of the contract in question.

The isolaration filed in the case consists of three counts; the first and second counts being based upon the contract in question, and set out the contract; they aver the obligation of the defendant in error to make the payments stipulated in the contract to be made by him; and that he failed to make the same; also aver that by reason of his default, the plaintiff in error has the right to recover for the use and occupation

of the premises for the year that the defendant in error occupied them. The third count is the consolidated common counts.

The defendant in error filed the general issue, and there was a trial by the court. At the conclusion of all the evidence, the Court found that the evidence did not sustain the right of the plaintiff in error, to recover under the declaration; and that he had no cause of action against the defendant in error; and sustained a motion to exclude all the evidence, and find the issues in favor of the defendant in error; and a judgment for costs was rendered against the plaintiff in error; from which judgment this writ of error is prosecuted.

We are of opinion, that there was no error in the rulings of the Court, nor in the finding of the issues in favor of the defendant in error. The plaintiff in error had no right to recover under the contract, because the contract was terminated, and he himself had terminated the same. The act of the plaintiff in error in ordering the defendant in error from the premises and repossessing himself of the same, and retaining the payment made by the defendant in error, effectually terminated the contract between the parties; and the remedy pursued was the one which the contract provided for, and the plaintiff in error had the right to exercise it, if he saw fit.

There is no provision in the contract giving the plaintiff in error the right to recover anything for use and occupation of the premises, which the defendant in error held under the contract, in case of a termination or forfeiture of the contract. Under the terms of the contract, the defendant in error had the right to the use and occupation of the pr mises, during the time the contract was in force; his occupation was therefore not wrongful; nor could it be the legal basis for recovery under the contract. Moreover, it is expressly stipulated in the

of the premises for the year that the defendant in error occupied them. The third count is the consolidated common counts.

The defendant in error filed the general issue, and there was a trial by the court. At the conclusion of all the evidence, the Court found that the evidence did not sustain the right of the plaintiff in error, to recover under the declaration; and that he had no cause of action against the defendant in error; and sustained a motion to exclude all the evidence, and find the issues in favor of the defendant in error; and a judgment for costs was rendered against the plaintiff in error; from which judgment this writ of error is prosecuted.

We are of opinion, that there was no error in the rulings of the Court, nor in the finding of the issues in favor of the defendant in error. The plaintiff in error had no right to recover under the contract, because the contract was terminated, and he himself had terminated the same. The act of the plaintiff in error in ordering the defendant in error from the premises and repossessing himself of the same, and retaining the payment made by the defendant in error, effectually terminated the contract between the parties; and the remedy pursued was the one which the contract provided for, and the plaintiff in error had the right to exercise it, if he saw fit.

There is no provision in the contract giving the plaintiff in error the right to recover anything for use and occupation of the premises, which the defendant in error held under the contract, in case of a termination or forfeiture of the contract. Under the terms of the contract, the defendant in error had the right to the use and occupation of the pr mises, during the time the contract was in force; his occupation was therefore not wrongful; nor could it be the legal basis for recovery under the contract. Moreover, it is expressly stipulated in the

contract, that any payments made by the defendant in error under the contract, might be retained by the plaintiff in error; and that these retained payments should be a full satisfaction and liquidation of all damages sustained by the plaintiff in error. By the terms of the contract itself, therefore, the damages sustained by the plaintiff in error were satisfied.

The judgment is affirmed.

Judgment affirmed.

contract, that any payments made by the lessee in error under the contract, might be retained by the plaintiff in error; and that these retained payments should be a full satisfaction and liquidation of all damages sustained by the plaintiff in error. By the terms of the contract itself, therefore, the damages sustained by the plaintiff in error were satisfied.

The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

Book 3561a

RH Dun July 31 1917

208 I.A. 350

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on 1917, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6395.

Samuel Freeman, appellee. 208 I.A. 350

vs Appeal from Will.

Chicago & Joliet Electric

Railway Co. appellant.

Niehaus, P. J.

This is an appeal from a judgment recovered in the Circuit Court of Will County, by the appellee, Samuel Freeman, against the appellant, Chicago & Joliet Electric Railway Company. The principal contention of appellant on this appeal, is that the verdict of the jury upon which the judgment was rendered, is against the weight of the evidence.

The evidence on the part of the appellee is to the effect that on May 6, 1914, he had attended a horse market in the City of Joliet, and was traveling homeward, about four o'clock in the afternoon, on Colline street, in a wagon drawn by a team of horses, leading another horse behind the wagon. The evidence tends to show, that the horses were gentle, used to the street cars, and "city broke".

The appellant occupies a part of Collins street, with its railroad tracks, and in the operation of its electric cars thereon; leaving a space of about 15 feet for vehicle travel which space is paved for that purpose. As the appellee, on the afternoon in question, was driving along Collins street, near Francis Street, towards the north, appellant's Chicago bound Interurban car came along, at about the rate of twenty miles an hour; and approached appellee from the rear, as he was driving along in the usual traveled part of the street; and it is claimed by appellee that he was unaware of the approach of the car, but that it finally caught up with him, and struck his horse which was tied to the rear of the wagon;

Gen. No. 6385.

Samuel Freeman, appellee.

va

Chicago & Joliet Electric Railway Co. appellant.

208 I.A. 350

Appeal from Will.

Mr. Justice, P. J.

This is an appeal from a judgment recovered in the Circuit Court of Will County, by the appellee, Samuel Freeman, against the appellant, Chicago & Joliet Electric Railway Company. The principal contention of appellant on this appeal, is that the verdict of the jury upon which the judgment was rendered, is against the weight of the evidence.

The evidence on the part of the appellee is to the effect that on May 8, 1914, he had attended a horse market in the City of Joliet, and was travelling homeward, about four o'clock in the afternoon, on Collins street, in a wagon drawn by a team of horses, leading another horse behind the wagon. The evidence tends to show, that the horses were gentle, used to the street cars, and "city broke".

The appellant occupies a part of Collins street, with its railroad tracks, and in the operation of its electric cars thereon; leaving a space of about 15 feet for vehicle travel which space is paved for that purpose. As the appellee, on the afternoon in question, was driving along Collins street, near Francis Street, towards the north, appellant's Chicago bound Interurban car came along, at about the rate of twenty miles an hour; and approached appellee from the rear, as he was driving along in the usual traveled part of the street; and it is claimed by appellee that he was unaware of the approach of the car, but that it finally caught up with him, and struck his horse which was tied to the rear of the wagon;

that the horse thereupon made a sudden jump and overturned the wagon, causing appellees team to run away, and thereby appellee was thrown upon the pavement under the wagon, and dragged a considerable distance on the street; the rear horse was hurt the wagon was smashed, and appellee was severely injured.

The principal controverted question in the case, is one of fact; as to whether the appellee's horse in the rear, was actually struck by the appellant's car. One witness for appellee testified positively, that "the car hit the horse on the right flank"; and "that the horse which was hit tipped the wagon over; and the horse which appellee was driving thereupon ran away dragging appellee along the pavement ." Another witness for appellee, who was also a passenger on the car, testified, that apparently the car hit the horse, because it gave an awful jump. Another witness, who, however, was about a quarter of a mile distant from the place of the accident, but looking in that direction at the time the accident occurred, testified, that from where he was standing, it appeared as if the car hit the horse from behind; that the horse jumped to one side, and tipped the wagon over. He also testified that he afterwards saw the horse which was hitched behind, and noticed that it had its leg and right hip skinned.

Appellee testified, that he did not notice the approach of the car, but felt the jar when the horse jumped; and looked around, and "saw the car right on him." The evidence of these witnesses is also corroborated to some extent, by the testimony of the veterinary who afterwards treated the horse alleged to have been struck. He testified, that the hock and flank were skinned in such a manner as to indicate that the hind horse had been struck by a glancing blow.

that the horse thereupon made a sudden jump and overturned the wagon, causing appellees team to run away, and thereby appellee was thrown upon the pavement under the wagon, and dragged a considerable distance on the street; the rear horse was hurt the wagon was smashed, and appellee was severely injured.

The principal controverted question in the case, is one of fact; as to whether the appellee's horse in the rear, was actually struck by the appellant's car. One witness for appellee testified positively, that "the car hit the horse on the right flank"; and "that the horse which was hit tipped the wagon over; and the horse which appellee was driving thereupon ran away dragging appellee along the pavement."

Another witness for appellee, who was also a passenger on the car, testified, that apparently the car hit the horse, because it gave an awful jump. Another witness, who, however, was about a quarter of a mile distant from the place of the accident, but looking in that direction at the time the accident occurred, testified, that when first where he was standing, it appeared as if the car hit the horse from behind; that the horse jumped to one side, and tipped the wagon over. He also testified that he afterwards saw the horse which was hitched behind, and noticed that it had its leg and right hip skinned.

Appellee testified, that he did not notice the approach of the car, but felt the jar when the horse jumped; and looked around, and "saw the car right on him." The evidence of these witnesses is also corroborated to some extent, by the testimony of the veterinary who afterwards treated the horse alleged to have been struck. He testified, that the hind and flank were skinned in such a manner as to indicate that the hind horse had been struck by a glancing blow.

On the other hand three of appellant's witnesses, namely the motorman in charge of the car, and two others, testified positively that the car did not run into appellee's horse; and there is a decided conflict in the evidence on this question. It is evident, therefore, that to determine where the weight of the evidence lies, depends upon which witnesses are most worthy to be believed. To properly decide this question involves passing on the respective credibility of all the witnesses who testified with reference to the matters in conflict. This is conceded to be, at least in the first instance, the province of the jury; but it must be apparent, also, that the jury were in the best position to determine the matter, because they had the best opportunity of judging the witnesses with reference to their credibility. Their credibility, as well as their number, must be considered in determining the preponderance of the evidence in a case. And to determine the credibility of the witnesses, it is necessary to take into consideration the intelligence, and the apparent fairness or unfairness of the different witnesses; the opportunities which they had for seeing or knowing what they testify about, as well as their interest, if they appear to have any; or their prejudice if they manifest any; as well as their general appearance and demeanor while testifying. All the factors mentioned, and others, necessarily enter into the question of the credit to be given to the testimony of the different witnesses; and these matters the jury and the trial judge are in the best position to consider and pass upon.

A court of review cannotpossibly review the testimony of the witnesses under the same favorable conditions for arriving at an accurate judgment, and it has therefore been uniformly held that the findings of a jury on a question of fact, that has been approved by the trial judge, should not be disturbed, unless it

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appears to be manifestly against the weight of the evidence. (McInery v Tri-City Ry. Co. 179 Ill. App. 152.) And the same question here discussed, was presented to this court in the case of Schneeweiss v Ill. Cent. R. R. Co. 196 Ill. App. 348 and we held in that case: that "even had we seen and heard the witnesses in the case, and felt that, had out duty been that of jurors, we would have found a verdict of not guilty still it would not follow that we for that reason alone, should reverse and remand the case. The jury and the trial judge were performing duties imposed upon them by law, in passing on the facts in this case. There was a question that intelligent men might well differ in answering, and if the jury and the trial court in our opinion acted fairly and intelligently in reaching their conclusions, we are given no power to reject them merely because it may seem to us, that in their place we would have reached a different result."

For the reasons stated we would not be justified in sustaining appellant's contention, that the verdict is manifestly against the weight of the evidence; nor do we regard the amount of the damages assessed by the jury as excessive, when the extent of the damage to appellee's property, and the extent of appellees injuries, and the effect thereof as disclosed by the record, are fully considered.

The judgment is affirmed.

Judgment affirmed.

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For the reasons stated we would not be justified in entertaining appellant's contention, that the verdict is manifestly against the weight of the evidence; nor do we regard the amount of the damages assessed by the jury as excessive, when the extent of the damage to appellee's property, and the extent of appellees injuries, and its effect thereon as disclosed by the record, are fairly considered.

The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

Mod v Dun Oct 10/17

208 I.A. 376

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 19 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6261. 208 I.A. 376

Edward I. Rubendall, appellee

vs Appeal from Stephenson.

Horace Tarbox, et al appellants.

Dibell, J.

In April 1912, the Tarbox family, consisting of Mary Tarbox, the mother, and Horace Tarbox, Winifred Tarbox, (now Kruse) Hessie Shoemaker and Ruth Tarbox, her children, owned certain pieces of real estate between certain streets in the city of Freeport, on which were two old buildings, and they devided a scheme to rebuild said buildings and connect them together and raise one part to the height of six stories and another part to the height of three stories and have them served by one heating plant and by one elevator. They employed an architect, who prepared plans for such reconstruction of these buildings. They employed Edward I. Rubendall, a contractor to do the work. Horace Taxbox was a lawyer and he prepared the contract and it was signed by Rubendall and by all the others except Mary Tarbox, and the work was carried on for nearly a year, when, on April 7, 1913 Rubendall was discharged and excluded from the building. On July 29, 1913, Rubendall began a suit for a mechanics lien against the owners and various subcontractors, and that cause proceeded to a hearing and to a decree in rem, establishing a mechanic's lien against the property. The decree was affirmed in this court in Rubendall v Tarbox 200 Ill. App. 280 . On December 3, 1913, Rubendall began this action of assumpsit against said parties above named in which to recover a personal judgment against them under the same contract. There was an adequate declaration, consisting of an original declaration, an amended declaration and additional counts. Defendants pleaded the general issue

Gen. No. 8981.

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Horace Tarbox, et al appellants.

Dibell, J.

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to each. All hte parties to this suit were also parties to the mechanic's lien suit, and defendants here were ~~defeated~~ defeated there, but there was no money decree against them personally.

This action at law was tried after the chancery cause and resulted in a verdict and a judgment for plaintiff for $2,982.87, and this is an appeal by the defendants therefrom.

The first contention of appellants concerns Mary Tarbox. She was named as a defendant in the praecipe for summons and in the summons, and she was served. The original declaration named the defendants and did not name Mary Tarbox. The plea to the first declaration named the defendants who pleaded and did not name her. The amended declaration named the defendants and did not name Mary Tarbox. The plea thereto was by the defendants without naming them. The additional counts named the defendants and did not name Mary Tarbox. The plea thereto was by the defendants without naming them. In an instruction the court told the jury that the defendants were Horace, Ruth and Winifred Tarbox, and Bessie Shoemaker. The jury found a verdict against the defendants without naming them. After the motion for a new trial had been denied, the clerk wrote a judgment for the amount of the verdict against the four defendants named and Mary Tarbox, and they prayed an appeal and Mary Tarbox joined the others in executing an appeal bond, which was approved. At the next term of the circuit court the plaintiff had the cause redocketed, gave notice to the defendants, and entered his motion to correct the record of the judgment by striking the name of Mary Tarbox therefrom. Defendants appeared and that motion was granted, and the name of Mary Tarbox was ordered stricken from the judgment, and as to her the judgment was vacated. The defendants, other than Mary Tarbox,

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excepted to this order and preserved a bill of exceptions. It is now contended that the court had no powerto amend the judgment at the next term, and that the amendment is void. It seems clear to us that when plaintiff omitted the name of Mary Tarbox from his declarations he abandoned the suit as to her; that the entry of her name in the judgment was a mistake of the clerk, and that the court had power to amend it by correcting the mistake at a later term, after notice to the opposite party, (Hogue v Corbit, 156 Ill. 540). The abstract of the bill of exceptions on that subject does not set out the evidence on which the court acted and we must assume that it justified the action. Defendants have not assigned for error the action of the court in so amending the record.

The second contention of appellants also concerns Mary Tarbox. The contract was prepared with her name inserted as one of the parties of the second part, and she did not execute it, and it is argued that it was not a contract binding on any one until all those named as parties had executed it, and that as all the special counts in the declaration are based on this written contract, there can be no recovery under them. All the parties knew at the time that Mary Tarbox did not sign it. They were all present at her house. There is some disagreement as to whether Rubendall signed it before he went there or while he was there, but the preponderance of the evidence is that he signed it at that house. This was followed by the signature of all the children. They all knew that Mary did not sign it. No one suggested that it was not in force for lack of her signature. All parties proceeded with their respective duties under the contract. At the trial the parties stipulated that this contract and the plans offered might be admitted in evidence as the contract executed on April 25, 1912 between the parties to this suit and that the plans were the

excepted to this order and preserved a bill of exceptions. It is now contended that the court had no power to amend the judgment at the next term, and that the amendment is void. It seems clear to us that when plaintiff omitted the name of Mary Tarbox from his declarations he abandoned the suit as to her; that the entry of her name in the judgment was a mistake of the clerk, and that the court had power to amend it by correcting the mistake at a later term, after notice to the opposite party. (Hogue v Corbit, 156 Ill. 540). The abstract of the bill of exceptions on that subject does not set out the evidence on which the court acted and we must assume that it justified the action. Defendants have not assigned for error the action of the court in so amending the record.

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plans of the building mentioned in the contract. No plea in abatement or plea denying joint liability was filed. No instruction was offered by the defendants that they were not liable because Mary Tarbox did not sign the contract. Many thousands of dollars were expended by the parties upon this building under this contract. We are of opinion that in this court it is to be treated as the contract of those who signed it.

The third contention of appellants concerns Horace Tarbox hereafter referred to as Tarbox. He was one of the owners and one of the parties of the second part, and the contract provided that the building should be erected and completed "to the entire satisfaction and under the direction of H. Tarbox." Thereafter he acted in all things as the agent of the other owners of the building. In our opinion in the former case, above referred to, we held that the language of the contract made Horace Tarbox, one of the owners, the agent of the other owners. ~~That decision is binding upon all the parties to this case, for it is a construction of the same contract in a suit where they were all parties. (Silurian Oil Co. v Neal 277 Ill. 481)~~ We do not doubt that that construction of the contract is correct. The owners allowed Tarbox to act for them fully and completely for many months without any objection. They frequently spoke of him to Rubendall as representing them. Tarbox testified that he was on the building nearly all the time for ten hours a day. When the whole evidence is considered in the record, appellants' abstract of which is unsatisfactory in many respects, it will be found that he interfered with Rubendall almost constantly. When Rubendall was about to let a sub-contract most advantageously, as he thought, Tarbox would forbid it and say that he would get the work done somewhere else, sometimes with a relative or a friend, sometimes at a higher price.

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Frequently Tarbox let the sub-contracts himself and paid the sub-contractors himself, instead of letting the money pass through the hands of Rubendall, as the contract required.

The contract required the building to be erected according to plans, specifications, scale and detailed drawings, made a part of this contract. In fact, when this contract was signed no specifications had been prepared. Thereafter Rubendall applied to the architect for the specifications, and the latter replied that Tarbox had directed him not to prepare them and had said that he would make them himself, and Tarbox afterwards told Rubendall that he would prepare his own specifications and that he and the other owners had agreed on what they should be, and he did prepare such specifications as were used. Appellants contend that as there were no specifications prepared by the architect, no contract was ever made between the parties. We are of the opinion that all the owners are bound by what their agent, Tarbox, did.

Rubendall had done some work and furnished some material on this work and on this building before the contract was signed. It was agreed that the contract should be considered as covering that work and that material, and that was expressed in the contract in these words: "This to cover all labor and material already furnished."

Appellants' principal contention is that the building was not properly erected. Rubendall introduced testimony to show that where the erection was improper, or was questioned, or differed from the plans, or had less strong material than the plans called for, the change was in every instance directed by Tarbox, and that his directions were followed. Tarbox denied many of these alleged directions, but upon a consideration of his cross examination in the record, which is much slighted

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in the original abstract, it will be found that he admitted very many directions by him for such changes, which he denied in his examination in chief, and when all the testimony on that subject is considered it will be found that the jury were well warranted in finding on those issues for appellee. Erikson v Ward, 266 Ill. 359.

Rubendall claims to have been discharged on April 7, 1913. Appellants contend that he really abandoned the contract and discharged himself on April 5. The contract in effect was that the owners were to furnish all the money; that from time to time Rubendall was to furnish them itemized bills for material and labor at cost price, and within three days after he furnished them such bills they were to furnish him the money to pay such bills and his commissions of five per cent thereon, which commissions were his sole compensation. He furnished them such itemized statements about twice each month. They almost never furnished him the money with which to pay them within three days, but delayed for weeks and sometimes six weeks or longer, and thereby caused him great embarrassment. On Saturday, April 5, they had been delayed these payments longer and longer and he should have had money from them long before that with which to pay the labor and the material men. He discovered that forenoon that Tarbox had gone to another county. He called up one of the other owners and asked for money. She said that he had none but would pay it when he got it. He thereupon paid off his men and told them they could leave till he had money with which to pay them. He called up the material men and told them to deliver no more material till he had money with which to pay for it, and the work stopped for Saturday afternoon. On Monday morning, April 7, Tarbox appeared at the building, and Rubendall told him that he was not going to stand it any longer to have the payments of money delayed long after the time fixed by the contract,

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but from that time on they must pay their money as the contract required. Tarbox told him to furnish his bills and he would be paid, but he also served him with written notice that he was discharged, and from that time on Rubendall was excluded fr om the building. Tarbox told a witness that they had to discharge Rubendall to get rid of the contract. At the trial they sought to prove as the excuse for discharging him that the building was costing more than they expected. Tarbox, thereafter completed the six story part of the building, and Rubendall proved how much Tarbox paid for the work. Tarbox did not rebuild the building which was to be carried to three stories, and Rubendall proved that the architect's estimate was of the cost of that portion of the work. The main purpose of the suit was to recover five per cent commissions on those two amounts, and Rubendall proved what he was able to earn elsewhere during the time he would have been occupied doing this work. Ryan v Miller 153 Ill. 138.

Shortly after the work began Tarbox requested Rubendall to get liability insurance for the benefit of the owners, and he did so and kept it in force. Two bills for the premiums were put in with the other bills and were paid by the owners without question. There was a balance unpaid when Rubendall was discharged. He paid it and seeks recovery for that amount here. After Rubendall was discharged, Tarbox went to the agent of the liability company for the purpose of paying this balance, and found that Rubendall had already paid it; yet he now contends that the defendants are not liable for it. The jury seems to have correctly decided that question against him. Soon after the work began Tarbox told Rubendall to install a telephone in the building, so that they could talk without delay to the sub-contractors, some of whom were in other towns. Rubendall paid the telephone

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rentals and tolls and seeks to be allowed for them here. We are of opinion that he was entitled to recover ~~fxx~~ therefor. Rubendall furnished scaffolding, hoisting elevators, derricks and various tools. He told Tarbox before the contract was made that he would furnish these things, but that he could not furnish them without pay, nor get his pay therefor only in the five per cent commissions. The following provision was inserted in the contract on that subject: "Said party of the first part shall furnish all scaffolding, hoisting elevators, derricks, tools etc. and all labor at net cost, delivered at the building and removed at the completion." Rubendall bought these various instrumentalities at certain prices, and claimed that, when he was discharged from the contract and removed these things, they were worth a certain less sum, and he sought to recover the difference as being their net cost. In view of the conversations between the parties and their conduct, we conclude he was entitled to recover this under the contract. He recovered nearly $500 less than he claimed on the entire bill, and allowing him also interest from the time the work was completed or should have been completed, the verdict was much more than $500 less than the full amount he claimed and interest, so that the jury made important deductions on some of these claims, and may have rejected his claim for the depreciation in value of these appliances.

Appellant's brief states that all the instructions given for Rubendall are erroneous, except seventeen lines in one of them but none of these objections are argued, except to make the claim that they gave the jury an opportunity to treat Tarbox as the agent of the owners. We regard that objection as not valid, and the other objections to the instructions as waived by failure to argue them. We find no reversible error in the record, and the judgment as so amended by striking the name of Mary Tarbox therefrom is therefore affirmed.

rentals and tolls and seeks to be allowed for them here. We are of opinion that he was entitled to recover ~~xxx~~ therefor. Rubendall furnished scaffolding, hoisting elevators, derricks and various tools. He told Tarbox before the contract was made that he would furnish these things, but that he would not furnish them without pay, nor get his pay therefor only in the five per cent commissions. The following provision was inserted in the contract on that subject: "Said party of the first part shall furnish all scaffolding, hoisting elevators, derricks, tools etc. and all labor at net cost, delivered at the building and removed at the completion." Rubendall bought these various instrumentalities at certain prices, and claimed that, when he was discharged from the contract and removed these things, they were worth a certain less sum, and he sought to recover the difference as being their net cost. In view of the conversations between the parties and their conduct, we conclude he was entitled to recover this under the contract. He recovered nearly $500 less than he claimed on the entire bill, and allowing him also interest from the time the work was completed or should have been completed, the verdict was much more than $500 less than the full amount he claimed and interest, so that the jury made important deductions on some of these claims, and may have rejected his claim for the depreciation in value of these appliances.

Appellant's brief states that all the instructions given for Rubendall are erroneous, except seventeen lines in one of them but none of these objections are argued, except to make the claim that they gave the jury an opportunity to treat Tarbox as the agent of the owners. We regard that objection as not valid, and the other objections to the instructions as waived by failure to argue them. We find no reversible error in the record, and the judgment is so rendered by striking the name of Mary Tarbox therefrom is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6371. **208 I.A. 381**

Frances T. Thomas, Admrx. appellee

vs Appeal from Lake.

Wells Fargo & Company, appellant.

Carnes P. J.

Appellee, Frances E. Thomas, administratrix of the estate of her husband, Harry Russell Thomas, deceased brought this action in the circuit court of Lake County in February 1916, against the appellant Wells Fargo & Company, under the Federal Employers' Liability act to recover damages for his wrongful death alleged to have occurred in the state of Indiana. There was a jury trial, and on August 5, 1916, the court, after overruling defendant's motions for a directed verdict, a new trial, and in arrest of Judgment, entered a judgment on the verdict in favor of the plaintiff for $14,250. from which judgment the defendant prosecutes this appeal.

The record was filed to our October Term, 1916, On stipulation of the parties their time to file briefs was extended and the cause continued to this term. Menatime, in February 1917, the supreme court filed its opinion in Walton v Pryor, 278 Ill. 563, holding that the circuit courts of this state have no jurisdiction in cases brought under that federal act to recover damages for a death occurring outside of this state. It appearing that the injury and death here in question occurred in the state of Indiana, appellant in its reply brief calls our attention to that decision, and asks a reversal of the judgment either without remanding or with directions to the circuit court to dismiss the suit for want of jurisdiction. Appellee has filed her brief and argument in answer, and asks us if we find that the circuit court was without jurisdiction not to remand the cause, suggesting that it would be a hardship

Con. No. 8171.

208 I.A. 381

Frances E. Thomas, Admr., Appellee

vs

Appeal from Ct.

Wells Fargo & Company, Appellant.

Curtis J. J.

Appellee, Frances E. Thomas, administratrix of the estate of her husband, Harry Russell Thomas, instituted this action in the circuit court of Cook County in December 1912. Against the appellant Wells Fargo & Company, under the Federal Employers' Liability act to recover damages for his wrongful death alleged to have occurred in the state of Indiana. There was a jury trial, and on August 2, 1916, the court, after overruling defendant's motions for a directed verdict, a new trial, motion arrest of judgment, entered a judgment on the verdict in favor of the plaintiff for $14,500. From this judgment the defendant prosecutes this appeal.

The record was filed in our October Term, 1916, On stipulation of the parties there was in file which was returned and the cause continued to this term. Remarks, in February 1917, this supreme court filed its opinion in Nelson v Pyper, 274 Ill. 583, holding that the circuit courts of this state have no jurisdiction in cases brought under that Federal act to recover damages for a death occurring outside of this state. It appearing that the injury and death here in question occurred in the state of Indiana, appellant in its reply brief cite our admission to that jurisdiction, and ask a reversal of the judgment either without remanding or with directions to the circuit court to dismiss the suit for want of jurisdiction. Appellee has filed her brief and argument in answer, and asks if we find that the circuit court was without jurisdiction not to remand the cause, suggesting that it would be a futility

on plaintiff to bring this case to this court again in order that it might be reviewed in the supreme court.

Appellee does not seriously contend that this case can be distinguished in principle from Walter v Pryon, supra; but has filed an able and exhaustive argument in effect questioning the conclusion reached by the court in that case. A reference to the action of the court as there reported indicates that the questions presented furnish grounds for debate and differences of opinion. The conclusion of the court is clearly expressed. It is our duty to follow the rules there plainly stated. It would serve no useful purpose to here attempt to state them in other and different language. On the authority of that decision the judgment must be reversed. The cause is not remanded

Reversed.

Finding of facts.

We find from the evidence that the injury to deceased from which he died, and his death, both occurred in the state of Indiana, and that the circuit court of Lake County had therefore no jurisdiction of the cause.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

208 I.A. 396

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6414

Leon Van Zele, a ellee

vs

H. H. Cleaveland et al

appellant.

208 I.A. 396

Appeal from Co. Ct. Whiteside

Carnes P. J.

This is a trial of right of property arising from the levy of an execution by the sheriff of Whiteside county issued on the same judgment as in Gen. No. 6413. The parties are the same as in that suit. Appellee claims the farm implements in dispute under the same mortgage and extension thereof. There is no evidence in this case of a demand on the sheriff for the property in question before beginning the suit, and of course there is no question of increase of mortgaged property involved; otherwise the questions are the same as in No. 6413 and for the reasons there stated the judgment is reversed and the cause remanded.

Reversed and remanded.

Gen. No. 8414

Leon Van Zele, w. a. alias

vs

H. K. Cleavelend et al

appellant.

Gurnee P. J.

This is a trial of right of property arising from the levy of an execution by the sheriff of Whiteside county issued on the same judgment as in Gen. No. 8413. The parties are the same as in that suit. Appellee claims the furniture in dispute under the same mortgage and extension thereof. There is no evidence in this case of a demand on the sheriff for the property in question before beginning the suit, and of course there is no question of interpose of mortgagee property involved; otherwise the questions are the same as in No. 8413 and for the reasons there stated the judgment in replevin and the costs remanded.

Reversed and remanded.

2 08 I.A. 396

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 404

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8439.

Charles Herman, appellee

vs

Henry Heuer, appellant.

208 I.A. 404

Appeal from DuPage.

Carnes P. J.

Appellee, Charles Hermann, sued Henry Heuer, the appellant in assumpsit, and filed a declaration of the common counts with affidavit of claim in the sum of $390.40. The defendant filed the general issue with affidavit of defense and notice of set-off of $150.00. There was a jury trial and judgment for the plaintiff on a verdict of $390.20 the exact amount claimed. The defendant prosecutes this appeal and assigns as error that the court erred in the admission and rejection of evidence; in the giving of instructions to the jury, and in overruling the defendant's motion for a new trial, and that the evidence does not support the verdict; also that the court erred in refusing defendant's motion at the close of all the evidence to instruct the jury to find the defendant "not guilty."

The bill of exceptions, as abstracted, contains only the evidence in the case, but in the record it shows a motion of the defendant at the close of all the evidence to instruct the jury "to find the issues in favor of the defendant". No question is presented here for review of the action of the court in refusing that peremptory instruction because it is not abstracted and because the error assigned does not cover that question, but it is not much argued that the court should have directed a verdict, and we see no room for the contention that there was no evidence tending to support a verdict for the plaintiff, even if we are permitted, under the condition of the record as hereafter stated, to consider whether there was any evidence tending to support the verdict. The instructions do

Jan. No. 6432.

Charles Herman, Appellee

vs

Henry Heuer, Appellant.

Appeal from DuPage.

2081.A. 404

Carnes P. J.

Appellee, Charles Herman, sued Henry Heuer, the appellant in assumpsit, and filed a declaration of the common counts with affidavit attached in the sum of $321.40. The defendant filed the general issue with affidavit of defense and notice of set-off of $180.00. There was a jury trial and judgment for the plaintiff on a verdict of $300.00 the exact amount claimed. The defendant prosecutes this appeal and assigns as error that the court erred in the admission and rejection of evidence; in the giving of instructions to the jury, and in overruling the defendant's motion for a new trial, and that the evidence does not support the verdict; also that the court erred in sustaining defendant's motion at the close of all the evidence to instruct the jury to find the defendant "not guilty."

The bill of exceptions, as abstracted, contains only the evidence in the case, but in the record is shown a motion of the defendant at the close of all the evidence to instruct the jury "to find the issues in favor of the defendant". No question is presented here for review of the action of the court in refusing that peremptory instruction because it is not abstracted and because the error assigned does not cover that question, but it is not much argued that the court should have directed a verdict, and we see no room for the contention that there was no evidence tending to support a verdict for the plaintiff, even if it had been permitted, under the pleadings of the record as abstracted which, to mention another thing, we may consider in support of the verdict. The instructions in

not appear in the bill of exceptions but are certified by the clerk as a part of the record, and it does not there appear who offered them, whether the plaintiff or the defendant, or the court gave them of its own motion, or that anybody objected to any of them at the time they were given. No motion for a new trial is found in the bill of exceptions. In that condition of the record we cannot consider the instructions and cannot consider whether the evidence was sufficient to sustain the verdict. C. B. & Q. R. R. v Haselwood, 194 Ill. 89 is one of the cases so holding, citing earlier cases. It was also there held that rulings on the admissibility of evidence could not be reviewed on appeal in the absence of a motion for a new trial. On that point it was overruled in Yarber v Chicago & Alton Ry. Co. 235 Ill. 589, and as the law now stands rulings on the admission of evidence might be considered in the present case; but there is no serious contention and no grounds for contention that there was error in such rulings.

We deem it unnecessary to further discuss and review the authorities on the effect of the failure to incorporate the instructions and the motion for a new trial in the bill of exceptions. A reference to the two cases above cited and the cases cited in those cases and subsequent cases in which one or both of those cases are cited, among them Gardner v Chicago, Lake Shore & E. Ry. Co. 154 Ill. App. 178 and Foster v Rudis 196 Ill. App. 174, will make it very clear that instructions are not part of the record and cannot be considered on review if not incorporated in the bill of exceptions, and that the question of the sufficiency of the evidence to sustain the verdict cannot be considered in the absence of a motion for a new trial preserved in the bill of exceptions, and that it is of no consequence that the record proper, as distinguished from the bill of exceptions, sets out the instructions and a motion for a new trial. The judgment is affirmed. Affirmed.

not appear in the bill of exceptions but was marked by the clerk as a part of the record, and it was for this error which offered them, whether the plaintiff or the defendant, in the court gave them of its own motion, or that upon objection to any of them at the time they were given, in order for a new trial is found in the bill of exceptions. In that condition of the record we cannot consider the instructions and cannot consider whether the evidence was sufficient to sustain the verdict. C. R. & Q. R. R. v Bassford, 144 Ill. 69 is one of the cases so holding, citing earlier cases. It was also there held that rulings on the admissibility of evidence could not be reviewed on appeal in the absence of a motion for a new trial. On that point it was overruled in Turner v Chicago & Alton R. Co. 230 Ill. 220, and as the law now stands rulings on the admission of evidence might be considered in the present case; but there is no error considered and no reason for contention that there was error in such rulings.

No law is necessary to further discuss the authorities on the effect of the failure to incorporate the instructions and the motion for a new trial in the bill of exceptions. A reference to the two cases above cited and the cases cited in those cases and subsequent cases in which one or both of these cases are cited, among them Turner v Chicago, Lake Shore & E. Ry. Co. 144 Ill. 69, 17 and Tracy v Mills 180 Ill. App. 174, will make it very clear that instructions are not part of the record and cannot be considered on review if not incorporated in the bill of exceptions, and that the question of the sufficiency of the evidence to sustain the verdict cannot be considered in the absence of a motion for a new trial preserved in the bill of exceptions, and that it is of no consequence that the record proper, as distinguished from the bill of exceptions, sets out the instructions and a motion for a new trial. The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 405

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8433.

Anton Palmieri, appellee

vs

Illinois Third Vein Coal Co.

appellant.

208 I.A. 405

Appeal from Bureau.

Carnes P. J.

In March 1914, Anton Palmieri, while in the employ of appellant, Illinois Third Vein Coal Company, mining coal, in the course of such employment, received an injury to his leg alleged to have been caused by the negligence of his employer. He brought this action on the case to recover for that injury and charged in his declaration that the defendant "in due form rejected the Workmen's Compensation act of 1913 and elected not to pay compensation thereunder", and that such rejection was in force at the time of the injury. The defendant pleaded the general issue and a trial resulted in a verdict and judgment for $1000 for the plaintiff. The defendant prosecutes this appeal and among other errors assigned and argued urges that plaintiff failed to prove his allegation that the defendant had rejected the provisions of the Workmen's Compensation act; that under sections 2 and 3 of the act the defendant was conclusively presumed to have filed notice of its election and to have elected to pay compensation according to the provisions of the act unless and until notice in writing of its e;ection to the contrary was filed with the Industrial Board, and unless and until it should either furnish to its employees personally, or post a copy of said notice of election not to so provide and pay compensation; and because of section 3 no common law or statutory right to recover damages existed. The evidence shows such notice filed with the Industrial board but fails to show any notice furnished to employees personally or by posting. ~~Appellee concedes that the employer and the parties were under the provisions of the act~~

Gen. No. 3433.

Anton Palmisani, appellee

vs

Illinois Third Vein Coal Co.

appellant.

Appeal from Bureau.

208 I.A. 405

Curtis P. J.

In March 1914, Anton Palmisani, while in the employ of appellant, Illinois Third Vein Coal Company, mining coal, in the course of such employment, received an injury to his leg alleged to have been caused by the negligence of his employer. He brought this action on the case to recover for that injury and charged in his declaration that the defendant "in the time rejected the Workmen's Compensation Act of 1911 and elected not to pay compensation thereunder", and that such rejection was in force at the time of the injury. The defendant plead the general issue and a trial resulted in a verdict and judgment for $1000 for the plaintiff. The defendant prosecutes this appeal and among other errors assigned and argued urges that plaintiff failed to prove his allegation that the defendant had rejected the provisions of the Workmen's Compensation act; that under sections 2 and 3 of the act the defendant was conclusively presumed to have filed notice of its election not to have elected to pay compensation according to the provisions of the act unless and until notice in writing of its election to the contrary was filed with the industrial board, and unless and until it should either furnish to its employees personally, or post a copy of such notice of election, and to provide and pay compensation; and because of failure to do so it forfeited its common law or statutory right to recover damages claimed. The evidence shows such notice filed with the industrial board but fails to show any notice furnished to employees personally or by posting. [illegible]

sonally or by posting. Appellee concedes the presumption that the parties were under the provisions of the act, and that the proof was not sufficient to rebut that presumption, and only meets that assignment of error by suggesting that the defendant by pleading the general issue did not deny that allegation in the declaration; that the defendant is estopped here from denying that it had rejected the provisions of the act because if it was working under the act at the time in question it was only needed to make that proof to defeat the action; that the defendant by arguing here that it was not guilty of any act or omission that caused the injury waives the defense under the Workmen's Compensation act, and cites Hughes v Kilbraid Coal & Mining Co. 197 Ill. App. 259, in support of that contention. That case is not reported in full. There may be an indication in the reported abstract of the decision that a defendant cannot contest its liability at common law on the ground that it was not negligent and had violated no statutory provision and at the same time be heard to say that it was operating under the employer's Liability act. But we do not see how such a rule could be established. Defendants engaged in extra hazardous employments as defined by the statute are presumed to be operating under the act. They are liable in a common law action, with certain defenses excluded, if they have rejected the act in the manner prescribed by the statute. Circuit courts have original jurisdiction of causes like the present case only when the defendant has so rejected the provisions of the act; therefore to state and make a good cause of action it must appear that the defendant has rejected the provisions of the act and had been guilty of some negligence or infraction of law occasioning the injury complained of. We see no reason to doubt that a plea of the general issue operates as a denial of each and all such allegations in the

declaration. Cases may easily be imagined where it is doubtful on the facts whether the defendant had rejected the provisions of the act. There might be a conflict of evidence whether it had or not posted the notices required. It would seem that the defendant must be permitted to contest every material allegation in the declaration. In the present case of the defendant was operating under the act, that was a complete defense; but if it was not so operating, and was not guilty of negligence or infraction of the mining law, there could be no recovery. It has the right to deny liability until proof is offered establishing the facts necessary to create liability. It may waive that right as in Zukas v Appleton Mfg. Co. _____ Ill. App. _____ affirmed in 279 Ill. 171, by trying a case regardless of the act and taking the position in the trial court that a consideration of the act or anything done under it is immaterial to the issue. But in the present case the defendant took no such position. The plaintiff alleged and failed to prove that it had rejected the provisions of the act. The defendant offered no evidence whether it had or not furnished notice to its employees personally, or by posting. It may be that notices were posted in compliance with the law, or there may be a dispute as to the fact of posting, or a difficult question of law may arise from the manner of posting. It is not a case where one can easily infer from the facts proven what other fact might have been proven.

We hold that the burden was on the plaintiff to establish his allegation that the defendant had rejected the provisions of the Workmen's Compensation act, and, failing to do so, that the verdict is not sustained by the evidence. For that reason without considering other errors assigned and argued, the judgment is reversed and the cause remanded.

Reversed and remanded.

isolation. These may easily be imagined where it is doubtful on the facts whether the defendant had rejected the provisions of the act. There might be a conflict of evidence whether it had or not posted the notices required. It might be that the defendant must be convicted in another county relating allegation in a indictment. In the present case of the defendant was charging under the act, that was a complete defense; but if it was not so charging, not was not guilty of negligence or infraction of the mining law, there could be no recovery. It has the right to deny liability until proof is offered establishing the facts necessary to create liability. It may waive that right as in Jones v Dayton Ry. Co. _____ III. App. _____ affirmed in 175 Ill. 172, by trying a case regardless of the act and taking the position in the trial court that a consideration of the act or applying such under it is immaterial to the issue. But in the present case the defendant took no such position. The plaintiff alleged and relied on proof that it had rejected the provisions of the act. The defendant offered no evidence whatever. It had no not "complied" notice to its employees generally, or in writing. It may be that notices were posted in compliance with the law, or there may be a dispute as to the fact of posting, or a difficult question of law may arise from the manner of posting. It is not a case where one can easily infer from the facts proven what prima facie might have been proven.

We hold that the burden was on the plaintiff to establish his allegation that the defendant had rejected the provisions of the Workmen's Compensation act. And, failing in so, that the verdict is not sustained by the evidence. The fact remains without considering other errors pleaded and argued, the judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6436. 208 I.A. 407 Ag. No. 17.

Metropolitan Discount Co.,
(a corporation)
Plaintiff-Appellee,
-vs-
Aug. Pitsch,
Defendant-Appellant.

Appeal from the County Court of Peoria County.

Carnes, P. J.

This is an action in assumpsit on three acceptances (negotiable instruments) $29.60 each, signed at Peoria, Illinois by the appellant, August Pitsch, in favor of the National Novelty Import Company, and endorsed and assigned by said company to the appellee, Metropolitan Discount Company, a corporation. The declaration set out said acceptances and the assignment thereof to appellee. The appellant plead (1) non-assumpsit; (2) fraud and circumvention in the procurement of said acceptances; (3 and 4) non-compliance with and violation of the Foreign Corporations statute of this state. (J & A. ch.32, par.2526 , et seq.) by the National Novelty Import Company, and the appellee, which each plea alleged were one and the same. The court sustained a general and special demurrer to the third and fourth pleas. The defendant stood by those pleas and the case went to a jury trial on the declaration, and the pleas of non-assumpsit, and fraud and circumvention. At the close of the evidence the court, at the instance of appellee, directed a verdict for the plaintiff for $88.80, the full amount claimed, and entered judgment on the verdict. The defendant prosecutes this appeal and argues the

question of the weight of the evidence on the issue of fraud and circumvention, and insists that it was a fair question for the jury whether that plea was sustained by the defendant. We do not find in the abstract of the bill of exceptions, or in the bill itself, a motion for a new trial. The sufficiency of the evidence to support a verdict cannot be considered in the absence of that motion so shown. (C.B.& Q. R.R.Co., v Hazelwood, 194 Ill. 69; Yarber v Chicago & Alton Ry. Co., 238 Ill. 589; People v Faulkner, 248 Ill. 158, and authorities cited in those cases.) But a motion to direct a verdict raises only a legal question whether there is any evidence legally tending to sustain the verdict, and the court's action on such motion is presented for review though no motion for a new trial is made. (Pate v Blair-Big Muddy Coal Co., 252 Ill. 198; Smith v Kewanee Light & Power Co., 196 Ill. App. 118.) The evidence tends to show that appellant was a merchant at Peoria, Illinois, and was at his store approached by an agent of the National Novelty Import Company and solicited to purchase some goods; that he did not purchase them, but did, at the request of the agent, sign said acceptances on the representation by the agent that it was something to show his boss that he had called on appellant; that appellant understood English imperfectly and could not readily read the papers and did not know their contents. Assuming these negotiable instruments were transferred to appellee, an innocent holder, the question is whether appellant was guilty of such negligence in signing them without ascertaining their contents as would preclude a defense under the plea of fraud and circumvention. While we are inclined to the opinion that

the facts proven would better support appellee's contention that appellant was guilty of such negligence, still it is at least doubtful whether it can fairly be said to be so clear from the evidence as to warrant the court in withdrawing that question from the jury.

The controlling question is whether the court erred in sustaining the demurrer to the third and fourth pleas. The third plea averred that "the plaintiff and said National Novelty Import Company are one and the same," a non-resident, foreign corporation, chartered under the laws of the state of Missouri for pecuniary profit, and not a railroad or telegraph company, nor in the insurance, banking, or money loaning business; that the plaintiff had not at the time when the several supposed promises by the defendant were made, and each of them, filed with the secretary of the state of Illinois its articles, or certificate of incorporation, a statement of its capital stock represented in Illinois, nor designated any officer in the state of Illinois on whom service of legal process against said plaintiff, "to-wit, against said National Novelty Import Company, which is one and the same as said plaintiff", could be had; nor had the secretary of the state of Illinois at the time when the several supposed promises were made, and each of them, as averred in the declaration, and each count thereof, issued a certificate entitling the plaintiff, to-wit, said National Novelty Import Company, which is one and the same as said plaintiff, to do business in Illinois, nor had the plaintiff been then licensed to do business in Illinois; nor had said National Novelty Import Company, which is one and the same as said plaintiff, any certificate of authority or had any such certificate ever

the facts proven would better support a plaintiff's contention that appellant was guilty of gross negligence, still it is at least doubtful whether it can fairly be said to be so clear from the evidence as to warrant the court in withdrawing that question from the jury.

The controlling question in whether the court erred in restraining the carrier to the United and Central plea. The plea averred that "the plaintiff and said National Novelty Import Company are one and the same," a non-resident, foreign corporation, chartered under the laws of the state of Illinois for pecuniary profit, and not a railroad or telegraph company, nor in the insurance business, or money lending business; that the plaintiff had not at the time when the several supposed promises by the defendant were made, and ever since, filed with the secretary of the state of Illinois its articles, or certificate of incorporation, a statement of its capital stock represented in Illinois, nor designated any officer in the state of Illinois on whom service of legal process against said plaintiff, "to-wit, National Novelty Import Company, which is the same as said plaintiff," could be had; nor had the secretary of the state of Illinois at the time when the several supposed promises were made, and ever since, issued them, or evermore in the meantime, and even now, issued a certificate entitling the plaintiff, to-wit, said National Novelty Import Company, which is one and the same as said plaintiff, to do business in Illinois, nor had the plaintiff been licensed to do business in Illinois; nor had said National Novelty Import Company, which is one and the same as said plaintiff, any certificate of authority, or had any such certificate ever

been issued to it to do business, or to exercise any of its corporate powers or functions in the state of Illinois; that the agent of the plaintiff, to-wit, said National Novelty Import Company, shortly after obtaining said supposed and pretended promises of the defendant, came again to the defendant's said place of business in Peoria, Illinois, and brought and delivered there a box of merchandise which he stated to the defendant that he, the defendant, had bought of and from the plaintiff through said agent by means of certain acceptances; "that prior to and since that time and at divers and sundry and at many other times and places in and about over the state of Illinois, the said National Novelty Import Company, which was then and there one and the same as the plaintiff, had in like manner procured alleged and pretended orders for similar goods, wares and merchandise, and by its agents, servants and employees, and traveling representatives, had in the same manner made divers and sundry and many other deliveries of its goods, wares and merchandise in the state of Illinois to other citizens thereof," concluding with a verification and prayer for judgment.

The fourth plea was in bar and proceeds with statements similar to those in the preceding plea that the National Novelty Import Company was at the time, etc., a foreign corporation unauthorized to do business in Illinois, and a similar statement that it left its goods with the defendant, and that it had prior to and since that time carried on similar business in the state of Illinois, coupled with the avermment that the National Novelty

Import Company was then and there one and the same as the plaintiff.

In testing the validity of these pleas the facts must be considered as there averred, disregarding the fact, if it is a fact. that the evidence introduced on the other issues tended to show those facts could not be proven. It seems clearly averred in those pleas that the plaintiff, Metropolitan Discount Company, and the National Novelty Import Company, were the same corporation; therefore that the same presumption is the same as if there was no formal assignment of the acceptances. It is clearly averred that said corporation had not complied with the provisions of said act of 1903; that it was before, and at, and after the time in question, transacting business and exercising corporate powers in the state of Illinois and liable to the penalty prescribed in section 6 of said act (J & A 2531) of not less than $1000. nor more than $10,000. and it was the duty of the attorney general and state's attorney to prosecute said corporation for the recovery of that penalty; and by the said section it is provided if "any foreign corporation shall fail to comply herewith, no suit may be maintained either at law or in equity upon any claim legal or equitable, whether arising out of contract or tort in any court in this state."

Counsel for appellee says that our statute does not apply to corporations engaged in interstate commerce, which is true; but there is no averment in either of the two pleas that the plaintiff was engaged in interstate commerce. No

Import Company was then and there one and the same as the plaintiff.

In testing the validity of these pleas the bill must be considered as true several, disregarding the fact, if it be a fact, that the evidence introduced on the trial tended to show those facts could not be proven. It would clearly appear in those pleas that the plaintiff, Interpleaded Discount Company, and the National Israelit Import Company, were the same corporation; therefore that the case presented is the case as it stood as to Israel Weingrand or the assignees. It is already proved that such corporation had complied with the provisions of this act of 1901; that it was before, and at, and after the time in question, transacting business and exercising corporate powers in the state of Illinois and it is the penalty prescribed in section 6 of said act (3 / 2001) of not less than $100. nor more than $10,000. and it was the duty of the attorney general and state's attorney to prosecute said corporation for the recovery of that penalty; and by the said section it is provided if "any foreign corporation shall fail to comply herewith, as aforesaid may be instituted either at law or in equity upon any claim legal or equitable, whether arising due or accrued or not in any court in this state."

Counsel for appellee says this can mean only and apply to corporations and is left with authority, which is true; but there is no pretend in evidence of the two pleas that the plaintiff was engaged in interstate commerce.

see no ground for the assumption that because it was a Missouri corporation it was manufacturing goods in that state, or transporting goods from that state to the state of Illinois. The averment is that it was in Illinois peddling goods at, and before, and after the time in question. These goods may have been manufactured in Illinois, or purchased in Illinois for resale there. Appellee cites 31 CYC, 171, to the proposition that "Matters going to the personal capacity or to the ability of plaintiff to sue must ordinarily be presented by plea in abatement;" and page 185 that "Unless pleas in abatement are filed at the proper time and in the proper order they will be waived"; and that " Filing a plea in bar is a waiver of a plea in abatement"; and page737, that "Want of legal capacity to sue ***** is waived where the objection is not urged by demurrer or answer." Such is no doubt the law; yet we think that the defense was properly plead in bar in the present case. The statute not only prohibits foreign corporations failing to comply with its provisions from maintaining suits, but it also makes the business transacted by them unlawful and illegal. The right of action upon such unlawful contracts was forever barred, not merely suspended. A plea in bar was held good in such an action in United Lead Co., v Elevator Manf. Co., 111 Ill. 199,- the court there quoting with approval from Cin. Int. H.A.Co., v Rosenthal, 55 Ill. 85- " When the legislature prohibits an act, ordeclares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it

"void. This is as manifest as if the statute had declared that it should be void."

It was said in Lehigh Cement Co., v Bolman, 245 Ill. 326,328,- " The contract upon which the suit was brought, being made in violation of an express statutory provision, was therefore void if the act applies to the business of appellee transacted in this state", citing earlier authorities.

The authorities are numerous on the definition of doing business in this state, as the phrase is applied to foreign corporations, and it is said in The Journal Co., v F.A.L. Motor Co., 181 Ill.App. 530,535, that the decisions of the appellate courts are so variant as to make it difficult to deduce a precise rule from them; but the pleas in question in the present case, in substance, aver that the plaintiff was at and before the time in question engaged in peddling goods in this state. We see no reason to doubt that should be held transacting business within this state. It was averred in these pleas that there was no other consideration for these acceptances than the transaction in the pleas stated. Appellee suggests that these pleas are double in setting up the defense of want of consideration with the other defense of violation of our corporation laws. We do not agree with this suggestion. The allegation of want of consideration was proper and quite necessary to show the acceptances were given under the conditions in the pleas stated and not other or different conditions. The judgment is reversed and the cause remanded.

Reversed and Remanded.

"void. This is as manifest as if the statute had declared that it should be void."

It was held in Lehigh Coal & Nav. Co., v. Kelley, 160 Ill. 232,-" The contract upon which the suit was brought, being made in violation of an express statutory provision, was therefore void if the act applies to the business of appellee incorporated in this state", citing various authorities.

The authorities are numerous on the definition of doing business in this state, as the phrase is applied to foreign corporations, and it is said in the Central Co., v. Kirk Water Co., 141 Ill. App. 557, 558, that the decisions of the appellate courts are so varied as to make it difficult to draw a precise rule from them; but the line in question in the present case, is sufficient, over that the plaintiff was at all before the time in question engaged in doing business in this state. We see no reason to doubt that it could be held transacting business within this state. It was proved in these cases that there was a other consideration for these contracts and that the transaction in the cases cited. Appellee contends that the Illinois Courts are confined in setting up the foreign of want of consideration with the other defense of violation of our corporation laws. We do not agree with this contention. The allegation of want of consideration was proper and yet necessary to make the contract void under the decisions in the cases cited and not under or different conditions. The judgment is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6437. Ag. No. 25.

The People of the State of Illinois for the Use of Drainage Commissioners of Drainage District No.2, of the Town of Ophir, La Salle County, Illinois,
Appellee,
-vs-
A. P. Wylie,
Appellant.

208 I.A. 409

Appeal from LaSalle.

Carnes, P. J.

Appellant, A. P. Wylie, was treasurer of drainage district No. 2, in the town of Ophir, in La Salle county, it is the same district in which he claimed to be elected drainage commissioner March 12, 1910, and his election was contested in the county court, which found the contestant elected, and appeal prosecuted to this court and transferred to the supreme court where the judgment of the county court was affirmed in Edgcomb v Wylie, 248 Ill. 602. As such treasurer money came into his hands on a second additional assessment levied by the district for the purpose of building bridges and prosecuting an appeal in a certain mandamus case in which the drainage district was interested, being the assessment under consideration in People v Adair, 247 Ill. 398, where the judgment of the county court was reversed and the cause remanded, but seems never to have been reinstated. The total amount collected from landowners on that assessment was $1049.47, and appellant received from his predecessor $5.58, rendering him liable to account for $105[illegible].06.

Gen. No. 6437. Ag. No. [illegible].

208 I.A. 409

The People of the State of Illinois for the Use of Trainage Commissioners of Trainage District No.3, of the Town of Ophir, in Bells County, Illinois,

Appellee,

-vs-

A. V. Tyrie,

Appellant.

Appeal from Bells.

Carrse, J. 4.

Appellant, A. V. Tyrie, was treasurer of drainage district No. 3, in the town of Ophir, in Bells county. It is the case of district in which he claimed to be elected drainage commissioner March 12, 1910, and his election was contested in the county court, which found the contested election, and appeal prosecuted to this court and transferred to the appellate court where the judgment of the county court was affirmed in Tyrie v Tyrie, 248 Ill. 602. As such treasurer Tyrie came into his hands on a record additional assessment levied by the district for the purpose of building bridges and prosecuting an appeal in a certain proceeding pending in which the drainage district was interested, being the assessment under consideration in People v Adair, 247 Ill. 329, where the judgment of the county court was reversed and the cause remanded, but seems never to have been reinstated. The total amount collected from landowners on said assessment was $1263.47, and appellant received from his predecessor $3.50, rendering his liable to account for $1266.97.

This suit was brought on his official bond against him and his surety. The declaration consisted of a count sounding on the bond, and the common counts. Pleas were filed and demurred to, after which there was a stipulation the effect of which appellant states and appellee concedes to be "that all proper pleas which could be filed to said declaration might be considered in and as filed, and that any or all proof which might be introduced under any proper plea might be introduced on the trial of the cause." A jury trial followed. Plaintiff dismissed as to the surety, and there was a directed verdict for plaintiff for $692.22 damages, upon which the court, after overruling motions for a new trial and in arrest of judgment, entered judgment for the penalty of the bond to be satisfied by the payment of the assessed damages.

The defendant appeals and urges here that there being no question under the evidence that the money received by him was all paid out for the benefit of the district, or otherwise accounted for, it is immaterial whether or not it was paid for the purpose for which the assessment was made; that it is inequitable to allow the district to compel a repayment; and that building bridges for which the money was raised was a part of the original work for constructing the ditch; although taxes were levied for the purpose of building bridges the money was not misapplied when paid for other legitimate expenses incurred by the district.

Appellee assigns cross errors. The theory of his case as tried below and presented here is that acts of the district can only be shown by its record; that the treasurer

This suit was brought on his official bond against the and his surety. The declaration consisted of a count relying on the bond, and the common counts. Pleas were filed and demurrer to, after which there was a stipulation the effect of which appellant states and appellees admit to be correct, that proper pleas which could be filed to such a declaration might be considered in and as filed, and that any or all proof which might be introduced under any proper plea might be introduced on the trial of the cause." A jury trial followed. Plaintiff dismissed as to the surety, and there was a directed verdict for plaintiff for $[illegible] damages, upon which the court, after overruling motions for a new trial and in arrest of judgment, entered judgment for the penalty of the bond to be satisfied by the payment of the assessed damages.

The determinant appellee has urged here that their treasurer no question under the evidence that the money purchased by him was all paid out for the benefit of the district, or therefore accounted for, it is immaterial whether or not it was paid for the purpose for which the warrant was issued; that it is equitable to allow the district to recover; and that in building bridges for which the money was issued was a part of the original work for constructing the bridge; although that was levied for the purpose of building which the money was misapplied when paid for other legitimate expenses incurred by the district.

Appellee assigns cross errors. The liability of the case as tried below was presented here to the effect that if the district can only be shown by its records; that its treasurer

of a drainage district is not protected in paying out the funds without a meeting of the commissioners and a vote of the majority thereof ordering the payment; that appellant had no such authority to warrant him in paying out any of the money disbursed by him, and therefore that the court erred in allowing him $225. paid on orders for costs of bridges, and an order for $100. attorney's fees for services in levying the assessment. But in the assignment of cross errors and in appellee's argument we are asked not to consider these cross errors unless we find it necessary to reverse the judgment on errors assigned by appellant.

Appellant's counsel only cite Hunniston v Trustees of Schools, 7 Ill. App. 122, to support their contention that the plaintiff is estopped from demanding money to be paid back to the district after it has been once paid for the benefit of the district; and appellee's counsel only cite Stanhope v School Directors, 48 Ill. App. 570, to controvert that position, and support their contention that an act forbidden to be done cannot become binding and lawful by the application of the principle of estoppel. Counsel for each side are able and experienced lawyers. We must assume there is little law to be found on that subject, and in the absence of authority we are not inclined to disturb the finding of the trial judge on that question. If it were a question whether appellant had, regardless of legal forms and requirements, acted honestly in the matter and in the interest of the district, an investigation of many transactions would have been required on which the present record is silent.

Drainage commissioners have no power to use funds appropriated, levied and collected for a certain purpose for another and different purpose. (Vandalia Drainage Dist. v Hutchins, 234 Ill. 31; People v McDougal, 208 Ill. 636.) A drainage district cannot lawfuly incur or pay indebtedness created prior to the levying of an assessment appropriating money for such purpose. (People v Brown, 253 Ill. 578; Drainage Comrs. v Kinney, 223 Ill. 67; Martin v Union Drainage Dist., 150 Ill. App. 402.) We think in view of the above cited cases the judgment of the court was as favorable to appellant as the law would warrant. It is not a question of the payment of money by a treasurer on orders that should not have been drawn but were drawn without his consent or his concurrence. Most, if not all, of the orders disallowed by the court were signed by appellant as commissioner, and his signature was necessary to the validity of the order. It was an unauthorized appropriation and payment of the funds of the district for which appellant was responsible in fact as well as in law. It is apparent that by some error $0.58 intended to be included in the verdict was omitted. There is some ground for arguing that some other small sums should have been credited appellant. We will not discuss them in detail. We are satisfied that everything considered the verdict was not too large; therefore, without considering the cross errors, the judgment is affirmed.

Affirmed.

Business associations have no power to use funds appropriated, levied and collected for a certain purpose for another and different purpose. (Vandalia Railway Co. v Bolmer, 224 Ill. 31; People v Chicago, 207 Ill. 624.) A drainage district cannot lawfully incur or pay indebtedness created prior to the levying of a necessary appropriating money for such purpose. (People v Drake, 303 Ill. 372; Trustees Taxes. v Elmore, 304 Ill. 67; Lutkin v Union Drainage Dist., 180 Ill. App. 424.) In view of the above cited cases the judgment of the court was favorable to appellant in the lower court. It is not a question of the payment of money by a treasurer on orders that should not have been drawn but were drawn without his consent or his concurrence. Now, if not all, if the orders disclosed by the court were signed by appellant as commissioner, and his signature was necessary to the validity of the order. It was an unauthorized appropriation and payment of the funds of the district for which appellant was responsible in fact as well as in law. It is apparent that by some error E.E.Ed intended to be included in the verdict was omitted. There is some ground for claiming that some other small item should have been credited to appellant. He will not dispute this in detail. He may maintain that everything considered the verdict was not for large; therefore, without considering the cross errors, the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Dun Oct 10/17

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6441. A. No. 1.

208 I.A. 410

Charles Frankel,
Appellant,
-vs-
Mary C. Ashmore,
Appellee.

Appeal from Peoria.

Carnes, P. J.

This is an appeal by the plaintiff from a judgment for the defendant in a suit brought in September, 1913, on a promissory note.

Mary C. Ashmore, the appellee, in August, 1910, resided in Peoria, Illinois. She was unmarried, a trained nurse, and owned a house and lot in that county. She was induced by some promoters to contract for sixty shares of stock in Great Western Casualty Company, which was represented to her as an insurance company organizing to do business in the state of Illinois, and to execute her promissory note, payable to said company, dated August 9, 1910, due five years after date, for the principle principal sum of $900. with interest at five per cent. and secure the same by a mortgage on said lot. It was agreed that the note and security would not be sold but would be deposited with the insurance department of the state of Illinois as a part of the fund required to authorize the incorporation of an insurance company. She was also promised that part of the stock would be sold for her as soon as the company was incorporated and money

208 I.A. 410

Charles Frank,

appellant,

-vs-

Mary E. Lehmann,

appellee.

Appeal from Peoria.

Garrec, P. J.

This is an appeal by the plaintiff from a judgment for the defendant in a suit brought in Replevin, 1919, on a promissory note.

Mary E. Lehmann, the appellee, in August, 1917, resided in Peoria, Illinois. She was married, a widow with one, and owned a home and lot in that county. She was licensed by some promoters to construct the state shares of stock in Great Western Casualty Company, which was represented to be an insurance company organizing to do business in the state of Illinois, and to execute her promissory note, payable to said company, dated August 4, 1916, for five years after date, for the principal sum of $500, with interest at five per cent. And secure the same by a mortgage on her lot. It was agreed that the note and security would not be negotiable but would be deposited with the insurance department of Illinois as a part of the fund required to authorize the incorporation of the insurance company. She was also promised that part of the stock would be sold for her as soon as the company was incorporated and money

enough realized to pay the whole subscription. There had at what time been filed a declaration and proposed charter with proof of publication for the organization of Great Western Casualty Company, but no further proceedings appear of record to have been taken; therefore, the corporation was never organized. The note came into the hands of Charles Frankel, appellant, endorsed- "Great Western Casualty Company, C.W.Horn, Geo. N. Ray", as appears by the pleadings, but when offered in evidence the endorsements had been filled out to show it was first transferred to the Commercial Fidelity Company by Great Western Casualty Company by C.W.Horn, chairman commissioners; then by Commercial Fidelity Company by C.W.Horn, president, to C.W.Horn; then by C.W. Horn to George N.Ray, and by George N. Ray in blank.

Appellant testified that he bought this note before due for $875. paying part in cash and part in check; that at the time of purchase he did not know appellee, and had no knowledge of any defense. It appeared that appellee had received some shares of stock in the Commercial Fidelity Company, probably of little or no value; which she supposed, until about the time of this suit, was the stock she was to get under her contract, and that she had paid three or four installments of interest on the note after appellant purchased it, but it does not appear that any act of hers in recognizing the note in any way influenced its purchase by appellant, or that he was misled to his disadvantage by her acts in making such payments. He filed a declaration consisting of one count declaring on the note and its assignment to him, with appropriate allegations showing him to be the legal owner, and the common counts. The defendant plead with the general issue a plea in bar that the Great Western Casualty

Company did not endorse said note, and the plaintiff was not a holder in due course; concluding to the country; and the further plea to the same effect, adding the substance of the facts above stated showing that the consideration had failed; concluding with a verification. The plaintiff filed a similiter to the first and second pleas, and a replication to the third alleging that the Great Western Casualty Company, payee in said note, did endorse said note, and the plaintiff is a holder of the same in due course for valuable consideration before maturity without notice; concluding to the country, to which replication the defendant filed a similiter. The issues so framed were submitted to a jury. The evidence showed the facts as hereberfore stated without conflict. The court refused a peremptory instruction offered by the plaintiff, and at the instance of the plaintiff instructed the jury if the note was purchased by and assigned to the plaintiff before due for a valuable consideration without notice of any defense, he was entitled to recover, notwithstanding want or failure of consideration, or that there might be a good defense against the original payee; that the fact that the Great Western Casualty Company at the time the note was executed was a corporation in the formation and was never completed was not a complete defense if the defendant knew at that time that the corporation was not in existence. And at the instance of the defendant that the legal title to the note could only be transferred to the plaintiff, or his prior endorsers, by the authorized endorsement of the payee, and the equitable title could only be transferred to the plaintiff, or his prior endorsers, by delivery of said note made by the payee; and if the payee, Great Western

company did not endorse said note, and the plaintiff was not a holder in due course; something by the country; and the factor plea to the same effect, adding the statement of the court above stated showing that the consideration had failed; concluding with a verification. The plaintiff filed a rejoinder to the first and second plea, and a replication to the third stating that the Great Western Casualty Company, payee in said note, did endorse said note, and the plaintiff is a holder of the note in the course for valuable consideration before maturity without notice; concluding to the country, to which replication the defendant filed a rejoinder. The issues to the 3d and rejoinder to a jury. The evidence showed the facts as hereinbefore stated without conflict. The court refused a peremptory instruction offered by the plaintiff, and at the instance of the plaintiff instructed the jury if the note was produced by and assigned to the plaintiff before the law a reasonable consideration without notice of any defense, or the matters in rejoinder, notwithstanding want or failure of consideration, or that there might be a good defense against the original payee; that the fact that the Great Western Casualty Company, at the time the note was executed was a corporation in the formation and was never organized and had complete defense if the organization had at that time been a corporation was not in question. And at the instance of the defendant, that the legal title to the note could only be transferred to the plaintiff, or the payee endorsement, by the endorsement of the payee, and the equitable title could only be transferred to the plaintiff, or the payee endorsement, by delivery of said note made by the payee; and if the jury, from the

Casualty Company, never completed its organization it would have no legally elected officers and would be powerless to endorse and deliver the note, and the verdict should be for the defendant. There being no conflict in the evidence, this last instruction practically directed a verdict for the defendant, which was rendered by the jury, and judgment entered thereon.

Appellant assigns fourteen errors here, but does not include among them errors of the court in instructing the jury, and does not in his brief suggest or argue ~~the~~ any such error except to suggest at the close of the brief in summing up his complaint, among other things, that the court erred " in giving each and all of the instructions given on behalf of the defendant".

The real issue presented by the pleadings and tried was whether the payee of the note had assigned it. It is assumed by counsel that the plaintiff was not the legal owner of the note unless it had been assigned by the payee. If he was not the legal owner he could not recover in this action; therefore, the inquiry was whether the purported assignment by the payee was valid and effectual. The only authority brought to our attention by counsel for either side on that question is a certified copy of an opinion of the appellate court of the third district filed October 13, 1916, in Pierik v Mueller, Gen.No. 6408. We do not find the opinion published, but it was certified January 27, 1917, from which we assume that it is the final opinion of that court in that case. The court there holds that before a corporation is fully organized there is no officer authorized to assign and transfer the title to a promissory note payable to the corporation,

Generally speaking, never completed his examination. It would have
seemingly elected officers and would be permitted to endorse and
deliver the note, and the results should be for the defendant.
There being no conflict in the evidence, this last instruction
practically disposed of verdict for the defendant, which was rendered
by the jury, and judgment entered thereon.

Appellant assigns numerous errors here, but have not
included among that errors of the court in instructing the jury,
and does not in its brief suggest or argue the say such error
except to suggest at the close of the brief in reading up the
complaint, along with it, that the court erred - in giving
each and all of the instructions given on behalf of the defendant.

The real issue presented by the pleadings and trial was
whether the payee of the note had endorsed it. It is assumed by
counsel that the plaintiff was not the legal owner of the note
unless it had been endorsed by the payee. If so, he was the
legal owner he could not recover in this action; therefore, the
inquiry was whether the purported endorsement by the payee was
valid and effectual. The only authority brought to our attention
by counsel for either side on that question is a syllabus and
of an opinion of the appellate court of the third district filed
October 12, 1910, in Ehrlich v. Smith, 246 Ill. 488. It is not
that the opinion published, but it was written January 27, 1911,
from which we assume that it is the final opinion of that court
in that case. The court there held that before a corporation
is fully organized there is no officer authorized to issue and
transfer the title to a promissory note payable to the corporation.

and that a note so attempted to be assigned is, in the hands of the holder, subject to all the defenses available against the payee, citing authorities. In the absence of other authority we are inclined to follow that decision without attempting to investigate and discuss theories of the transfer not presented here by counsel. Appellant grounds his claim on an alleged transfer to him of the legal title to the note by endorsement by the payee. We are of the opinion that he did not in that way acquire the legal title. Failing to show himself the owner of such title he could not recover; therefore the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this ninth day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 412

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6455.

State Bank of East Moline,

appellee

vs

Moline Pressed Steel Company

appellant.

208 I.A. 412

Appeal from Rock Island.

Carnes P. J.

The appellee, State Bank of East Moline, holding the judgment note of the appellant, Moline Pressed Steel Company a corporation, caused judgment by confession to be entered thereon in term time in the circuit court of Rock Island county for $5,355.33 which included $300 for attorneys fees for entering up the judgment. Execution issued thereon. At the same term of court attorneys for the defendant entered their special appearance, and the special appearance of the defendant "for the sole and only purpose of questioning and challenging the jurisdiction of the court over the person of the said defendant to enter said judgment, and for the purpose of moving the court to withdraw and quash the said execution, and for no other purpose." They entered the motion, and assign as reasons therefor that it appeared from the record and proceedings that said judgment is void for want of jurisdiction of the court over the person of the defendant, and said execution is void because it was issued upon a void judgment. The court heard and overruled the motion. Both the record proper and the bill of exceptions show that the defendant prayed an appeal to this court only from said ruling of the court in overruling said motion, which was allowed, and the execution ordered stayed pending said appeal. Appellant filed an appeal bond reciting an appeal from the judgment of the court and the order overruling the motion to set the judgment aside, and claims here that it appealed from both the judgment and the order. This claim cannot be sustained in

Sup. No. 9925.

State Bank of East Moline,

appellee

vs. Appeal from Rock Island.

Moline Pressed Steel Company

appellant.

Curtis J. J.

The appellee, State Bank of East Moline, holding the judgment note of the appellant, Moline Pressed Steel Company a corporation, secured judgment by confession in the superior tribunal in term time in the circuit court of Rock Island county for $3,000.00 which included $300.00 for attorney fees for obtaining the judgment. Execution issued thereon. At the same term of court attorneys for the defendant entered their general appearance, and the special appearance of the defendant "for the sole and only purpose of quashing and vacating the judgment of the court over the person of the said defendant to enter said judgment, and for the purpose of moving the court to vacate and quash the said execution, and for no other purpose." They entered the motion, and sought to present evidence that it appeared from the papers and proceedings that said judgment is void for want of jurisdiction of the court over the person of the defendant. And said execution is void because it was issued upon a void judgment. The court heard and overruled the motion. Both the general issue and the plea of execution were filed by the defendant praying to submit to the court only upon the issue of the court's jurisdiction of the person of the defendant, which was allowed, and the stenographer's minutes were filed. Appellant filed an appeal bond providing to appeal from the judgment of the court and its order overruling the motion to set the judgment aside, and claims here that it appeals from both the judgment and the order. This claim cannot be sustained in

view of the foregoing statement as to the record. The judgment of the trial court on the motion is the question before us. The general rule is that a motion to open or set aside a judgment that has been confessed under a warrant of attorney in a court of record by an attorney of that court is addressed to the discretion and the equitable powers of the court. (Moyses v Schenkorf, 238 Ill. 332; Tyner v Neal Institutes Co. 185 Ill. App. 351.) But counsel say in their argument that the motion did not invoke the equitable power of the court in any way. Their theory, as we understand it, is that the judgment was absolutely void because they claim it nowhere appears in the court proceeding, which they present here in full. that the court got jurisdiction of the defendant. The note and warrant of attorney was signed "Moline Pressed Steel Co. by F. A. Lundahl, Pres." with no seal attached An affidavit was filed with the declaration that the signature of the "defendant" was genuine. There was no effort to show in the trial court that the president was not authorized to execute the warrant of attorney, and no claim here that he in fact was not so authorized. The contention is that it must have affirmatively appeared in the trial court that he was so authorized. The question is settled in Snyder Bros. v Bailey 165 Ill. 447, where the argument was that the proofs must show not only that the warrants of attorney were executed by officers of the company, but also the authority of such officers; and this position was denied and Matzenbaugh v Doyle 158 Ill. 331 was held not to be authority for such rule. On the record made the court prima facie had jurisdiction of the defendant. No fact was presented on the motion to set aside the judgment showing want of such jurisdiction; therefore the court properly overruled the motion.

The warrant of attorney authorized the judgment confessed

view of the foregoing a nonsuit as to the remedy. The judgment of the trial court on the motion is affirmed.

The general rule is that a motion to open or set aside a judgment that has been confessed under a warrant of attorney is a court of record by an attorney of that court is addressed to the discretion and the equitable powers of the court. (Bergen v Bennett, 38 N.J. L. 488; Tyler v Lent Institute 54. 1.J. L. 111, 114.) But counsel may in their argument that the motion is not barred the equitable power of the court in any way. Their theory, as we understand it, is that the judgment was absolutely void because they claim it no there appears in the court proceeding, which they present here in full, that the issuer of judgment of the defendant. The note was without of attorney for signed "Lucius Pressed Steel Co. by A. A. Lundahl, Pres." (the ex. said intended An affidavit was filed with the declaration that the signature of the "defendant" was genuine. There was no effort to show in the trial court that the president was not authorized to execute the warrant of attorney, and no claim here that he in fact was not so authorized. The contention is that it must have affirmatively appeared in the trial court that he was so authorized. The question is settled in Dryer Bros. v Bailey 105 N.J. 447. There the argument was that the courts must see not only that the warrants of attorney were executed by officers of the company, but also the authority of such officers; and this position was denied and Mateskowsky v Dayis 120 N.J. 22 was held not to be authority for such rule. On the record made the court prima facie had jurisdiction of the defendant. No fact was presented on the motion to set aside the judgment showing want of such jurisdiction; therefore the court properly overruled the motion.

The warrant of attorney authorized the judgment confessed

to include "attorneys fees to the full amount allowed by law". The court heard proof that $500 was a reasonable fee. Appellant complains that on the face of the proceedings the judgment could not include that sum for attorneys fees; that the language in the warrant of attorney could not be construed to warrant any attorneys fee, and if it be construed to warrant a reasonable fee, we should take notice that the fee allowed was unreasonable. The court below was not asked to modify the judgment to exclude this fee, or any part thereof. Evidence was introduced when the judgment was entered to the effect that that fee was reasonable. The defendant assuming that it was not in court for any purpose except to set aside the judgment, made no effort to correct this matter there, and should not be heard here to complain of that action of the court.

Appellant objects that the cognovit was broader than the warrant in stipulating that no writ of error or appeal shall be prosecuted from a judgment, and no bill in equity shall be filed to interfere with the operation of the judgment. No such point was made in the court below, and the objection does not go to the merits; therefore, for reasons stated above, that objection cannot prevail.

The judgment and order of the court in refusing the defendant's motion to set aside said judgment and quash said execution is affirmed.

Affirmed.

to include "attorneys fees to the full amount allowed by law". The court found proof that $500 was a reasonable fee. Appellant complains that on its face of its proceedings the judgment could not include this sum for attorneys fees; that the judgment in the warrant of attorney could not be construed to covert any attorneys fee, and if it be construed to warrant a reasonable fee, we should take notice that the fee allowed was unreasonable. The court below was not asked to modify the judgment to exclude this fee, or any part thereof. Evidence was introduced upon the judgment was entered to the effect that the fee was reasonable. The defendant assuming that it was not in court for any purpose was asked to set aside the judgment, and in effect to correct this matter there, and should not be heard here to complain of that action of the court.

Appellant objects that the contract was broader than the warrant in stipulating that no writ of error or appeal shall be prosecuted from a judgment, and no bill in equity shall be filed to interfere with the execution of the judgment. No such point was made in the court below, and the objection does not go to the merits; therefore, for reasons stated above, the objection cannot prevail.

The judgment and order of the court in refusing the defendant's motion to set aside said judgment and order will be affirmed.

AFFIRMED.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this ninth day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

208 I.A. 423

Reinforced Concrete Pipe Company,
et al,
Defendants in error,

-vs- Error to [illegible].

City of Romeoville,
Plaintiff in error.

Dibell, J.

On February 6, 1911, Henning and Vineyard, partners, entered into a contract with the city of Romeoville to construct a sewer system for said city in accordance with certain plans and specifications, under an ordinance therefor, enacted by the city. They gave bond and entered upon the performance of the contract, and, after doing a part of the work and receiving part of the payment therefor, and after obtaining material for the work from various material men, they abandoned the work on November 23, 1911. The city did not proceed against the bond nor did it advertise for bids for the completion of the work, although much more than $500. worth of work remained to be done, (section 74 of the Local Improvement act) but the city completed the work itself. Certain firms and corporations, which had furnished material to the contractors, began this suit for a lien upon the money, bonds or warrants, under section [illegible] of the act of 1903 relating to Mechanics' Liens. Other parties who had furnished material, filed intervening petitions. The cause was referred to the master in chancery, who took the evidence and re-

ported the same, with his conclusions favorable to the material men. Objections thereto by the city were overruled and stood as exceptions before the court, and there was a hearing and a decree in favor of the material men. The amount found to be in the hands of the city subject to these liens was less than the amount of the liens. Thereupon the lienors agreed to scale down the amount of their claims proportionately so as to bring the total within the sum for which the city was chargeable; and this was done. They also waived all question of priority of lien as among themselves. They were given liens by the decree to the extent of the fund remaining in the hands of the city subject to lien. The city prosecutes this writ of error to review said decree.

In ascertaining the total contract price for which the city was liable the court added to the original contract price $3,500. which the board of local improvements had allowed to Henning & Vineyard on account of extra excavation of rock. The city contends that this allowance by the board of local improvements was unlawful and should not be charged against the city or added to the contract price, because the contractors were bound to do the work for the contract price. ~~This is a misapprehension~~. In the instructions to bidders the city stated the rock excavation at 3,000 yards, and, as to this and other matters, stated that these quotations were approximate only and that the board of local improvements reserved the right to increase or decrease the amounts might be deemed necessary. In the bid Henning & Vineyard, which was accepted and upon which the contract was based, they

bid for extra excavation $1.00 per cubic yard, ~~so that extras were plainly contemplated by the contract~~. The proof showed that much extra rock was encountered and that it was hard and flinty, and that there were 4,700 cubic yards of rock excavated by the contractors in addition to the 3,500 yards named in the instructions to bidders. Henning & Vineyard applied to the board of local improvements for an allowance therefor, and the city engineer made an estimate of this extra excavation of rock and certified to the board that Henning & Vineyard were entitled to $5,250. for 3,500 cubic yards of rock at $1.00 per cubic yard, to $150. for change in construction of traps, and to $100. for hauling dirt, a total of $5,500, and a meeting of the board was held and it allowed $5,500 to Henning & Vineyard for said extras, and the ~~proof shows that the~~ city afterwards paid it. It is clear, therefore, that this payment for extras was within the express provisions of the contract and was lawful and should therefore be added to the original contract price. But if this is incorrect, and if it was unlawful for the city to pay said $5,500, the result is the same as far as these lienors are concerned, for in that view of the case the city unlawfully paid out this $5,500, and that payment is to be disregarded in estimating how much the city should have had on hand out of which lienors could be paid.

It is contended by the city that, even if the said $5,500 should be added to the original contract price as to all other lienors, the Streator Clay Mfg. Company, the largest lien creditor, is estopped from having the benefit of that sum. On

bid for extra excavation [illegible] per cubic yd., a sum which was quickly made [illegible] by the contractor. The point [illegible] that much extra rock was encountered and that it was [illegible] fairly. And that it was $4,700 cubic yards of rock excavated by the contractors in addition to the 3,300 yards called for in the instructions to bidders. Leaving a Thirteen existing in the board of local improvements for an alderman therefor, and the city engineer made an estimate of the extra excavation [illegible] and certified to the board that Sewing & Company were entitled to $8,250. For 3,300 cubic yards of rock at $1.50 per cubic yard, to $1,950. For change in construction of trench, $[illegible]. For hauling dirt, a total of $5,000, and a meeting of the board was held and it allowed $4,500 to Sewing & Company for [illegible] extra, and the road above that was the only alternative [illegible]. It is clear, therefore, that this point [illegible] the engineer provisions of the contract and was [illegible] therefore be added to the original contract price. But if this is incorrect, and if it was intended for the city to pay [illegible] $5,500, the result is the same as far as those figures are concerned, for in that case the city paid [illegible] this $5,500, and that payment is to be disregarded in ascertaining how much the city should have in [illegible] out of which income [illegible] be paid.

It is contended by the city that, even if the [illegible] $5,500 should be added to the original contract price [illegible] of or income, the Sterling City Company, the surety [illegible] contractor, is endowed from having the benefit of [illegible].

October 6, 1911, The Commercial Bank of Evansville, Indiana, addressed a letter to Henning & Vineyard, in which it said that if the city should allow the contractors reasonable compensation for excavating said extra rock, the bank would advance the contractors the money necessary to complete the sewer system. On the reverse side of this letter the Streator Clay Mfg. Company made an endorsement to the effect that if this proposition was accepted by the city, that company would allow any money thereafter advanced by said bank for this job to be paid in full before its bill for material was paid. One of the contractors showed this document to the board of local improvements before they allowed the bill for $5,500. for extra rock excavation. The proof showed that the bank did thereafter advance some money, which had not been paid when the evidence was taken.. It was not shown that the board allowed said bill of $5,500 because of said letter and endorsement by the Streator Clay Mfg. Company, nor that that had any influence in bringing about that result. It seems clear from the proceedings of the board and the proof, that it was allowed because the contract provided for it and because the city engineer certified that the contractors were entitled to it. Besides, the city is not harmed and the bank is not complaining. We find no error in the decree in this respect.

Before Henning & Vineyard quit the work there had been issued to them in vouchers $3548, and the master and the court held that these were not properly issued and that the city should be treated as if it still had that fund on hand. The statute authorized vouchers to be issued under certain circumstances payable only out of the first installment of the assessment

October 6, 1911, the commercial bank of Kenneville, Indiana, addressed a letter to Hearing & Sharpe, in which it said that if the city should allow the contractors reasonable compensation for excavating said extra rock, the bank would advance the contractors the money necessary to complete the sewer system. In the reverse side of this letter the Kenneville city clerk made an endorsement to the effect that if this proposition was accepted by the city, that company would allow any money thereafter advanced by said bank for this job to be paid in full before the bill for material was paid. One of the contractors signed this document as the board of local improvements before they allowed the bill for $1,500. for extra rock excavation. The proof showed that the bank did thereafter advance some money, which had not been paid when the evidence was taken. It was not proved that the board allowed said bill of $1,500 because of said letter and endorsement by the treasurer thereof. Conceded, for that that had any influence in bringing about that result. It does show from the proceedings of the board and the proof, that it was allowed because the contract provided for it and because the city engineer certified that the contractors were entitled to it. Besides, the city is not bound and the bank is not responsible. We find no error in the course in this respect.

Before hearing of Sharpe gave the work there had been issued to them in vouchers $1500. and the sewer and the board held that these were not properly issued yet that the city should be treated as if it still had that money. The charter authorized vouchers to be issued under certain circumstances payable only out of the first installment of the assessment

levied for the improvement, and then only in sums of $100. or a multiple thereof. These vouchers were not made payable out of the first installment, but out of later installments, and they were not in sums of $100, or multiple thereof, and in other respects they did not conform to the statutory provisions concerning such vouchers. In National Bank v City of Elgin, 136 Ill. App. 452, in a similar case, we held that the issue of such vouchers was unlawful, and that in a case similar to this the amount thereof should be treated as if still in the hands of the city. Practically the same conclusion was reached in Terre Haute Vitrified Brick Co., v Montgomery County Loan & Trust Co., 163 Ill. App. 441, and we consider that the question has been conclusively so decided ib Alexander Lumber Co., v Farmer City, 272 Ill. 364. But it is argued that if this conclusion in true in the main, still it is incorrect as to one voucher for $[illegible], which was paid by the city on July 30, 1911. This payment, if so made, was after nearly all the notices of Mechanics' Liens had been served. We do not find that this point was raised before the master or the court below, and therefore it was not waved.

It is argued that there is no proof in this record that the special assessment for this improvement had ever been confirmed by the county court. The master found that it had been confirmed. The vouchers and the improvement bonds in evidence, and executed by proper officers of the city, each recite that the assessment roll had been confirmed by the county court on October 4, 1910.

levied for the improvement, and that only in case of [illegible], on a multiple tenement. These members were not mere people who of the first installment, but men of their individuality, and they were not in arrear of $100, or multiple thereof, and in other respects they did not conform to the statutory prerequisites governing such voucher. In [illegible] v. City of [illegible], 108 Ill. App. 620, in a similar case, it held that the issue of such vouchers was unlawful, and that in a case violative of this law amount thereof should be treated as if still in the treasury of the city. Inasmuch the same conclusion was reached in [illegible] State Trustees Bank v. [illegible], 1 Ill. App. 441, and we would not be [illegible] somewhat so [illegible] in Alexander v. [illegible], 1 [illegible] Ill. 104. But it is argued that if this conclusion is true in the main, still it is inapplicable as to the vouchers for [illegible], which was paid by the city on July 20, [illegible]. This argument, if so [illegible], was after [illegible] all the vouchers [illegible] had been served. We do not find that this point was raised before the master or the court below, and therefore it was not [illegible].

It is argued that [illegible] the [illegible] that the [illegible] assessment for this improvement had [illegible] by the county court. The [illegible] that it had been confirmed. The vouchers on the improvement bonds in [illegible], [illegible] by proper officers of the city, [illegible] roll had been confirmed by the county court in [illegible], 1911.

It is contended that as bonds were to be issued against the several installments, payable therefrom, therefore there should have been no money decree against the city. The answer to this is that the proof showed that the city had sold all these bonds. The statute gives a lien on the money, and the money is, or should be, in the hands of the city. Alexander Lumber Co. v Farmer City, supra, is conclusive on this question, and also on the further contention of the city that it should not be charged with interest in the decree. There are some other minor contentions by the city, of which we think it sufficient to say that we do not regard them as sustained by the record.

Of several of the matters we have above discussed, we should say that we do not find that they were properly raised by objections before the master, or by exceptions before the circuit court. We find no reversible error in the record, and the judgment is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 430

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

R H Dun Oct 4/17

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6428. Z1.

Clara Birkel,
appellee,

-vs.

John R. Powers,
appellant.

208 I.A. 430

Appeal from Peoria.

Dibell, J.

On January 24, 1916, Clara Birkel brought this suit against John R. Powers for breach of promise of marriage and filed an appropriate declaration, to which the defendant pleaded the general issue. Afterwards, by leave of court, plaintiff filed the common counts in assumpsit, and a copy of an account sued on. It was stipulated that the general issue should stand to the additional counts. The cause was tried by a jury and plaintiff had a verdict and a judgment for $10,000, and defendant appeals.

It is argued that under the evidence plaintiff was not entitled to recover. The evidence she introduced tended to establish the following facts. Plaintiff was the daughter of a gardner whose home and premises were somewhere on the outskirts of the city of Peoria. She lived at home with her parents. When she was between twenty and twenty-one years of age she first met defendant. He was a saloon keeper, ran a chop house, and owned and traveled about the country with race horses and was well to do. He was then about fifty-one years of age and was either then living

with his third wife, or divorce proceedings by her were then pending against him. Defendant drove fine horses and took plaintiff for rides, and took her to theatres, moving picture shows, and other entertainments. About six months after their first acquaintance, he seduced her and thereafter took her to a house of ill-fame and had intercourse with her there, and thereafter frequently took her in the evening to the rooms he occupied in a hotel and often had intercourse with her there; he frequently came to her home in a cab at two or three o'clock in the morning, drunk, and at his request she went to his rooms and stayed with him two or three days to sober him up. During this time his third wife procured a divorce from him. After several years of these relations plaintiff's mother died and the proof implies that thereby her home was broken up and her father went elsewhere to live. Thereupon, upon defendant's suggestion, rooms were rented for them in some apartment house and she removed to that place part of the furniture from her home and defendant removed there furniture which he had and they began living there together in the autumn of 1903 and they so lived till January, 1916, over twelve years. She did all the house work, cooked the food, scrubbed the floors and performed all other like menial occupations without any servant; and also was defendant's mistress except during the last three years of that time. He furnished her weekly a certain sum to run the house. She bought the provisions and bought table and bed linen and carpets and the like whenever they needed to be replenished. She had inherited some property from her parents, her father having died a year after her mother, and defendant did not furnish her enough to pay

the bills, and by his direction plaintiff used her own money often upon his repeated request promise that he would make it good to her. He frequently went away with his race horses and was gone from one to four weeks, and left her with an insufficient supply of money and she used her own funds to make up what was needed. At one time he was taken seriously ill at Detroit and was placed in a hospital and he telegraphed for her to come and she went and stayed in the vicinity of the hospital several weeks until he was pronounced out of danger, when she returned home. When he was able to travel he sent for her again and she brought him home to Peoria and acted as his nurse during the journey. At another time her he met with a serious street car accident and had several broken bones. He refused to be taken to a hospital because he wished to be nursed and cared for by plaintiff in his own apartments. Ata nother time he had a serious rupture of the testicles, and she nursed him though quite a long illness and attended to his wounds herself. When he returned from Detroit, he had a serious and offensive wound, and she nursed him and dressed the wound herself for a long time. She testified that many times during these years marriage was discussed between them and that he often promised to marry her and that she assented, but he continually postponed the marriage. She testified that she often asked him to marry her and that he never refused to do so until January, 1916, just before this suit was begun. At one time she told him that she was going to leave him and go to her sister's as she did not like to live any longer with him in that unlawful relation, and in reply he begged her to stick by him and said that he would marry her. Towards the close of this period

the hills, and by his direction placed her on every
often upon his repeated request promise that he would make it
good to her. He frequently went away with his father and
was gone from one to four weeks, and left her with an insufficient
supply of money and she used her own in order to meet what was
needed. At one time he was taken suddenly ill at Detroit and was
placed in a hospital and he telegraphed for her to come and she went
and stayed in the vicinity of the hospital several weeks until he
was pronounced out of danger, when she returned home. That is,
was able to travel he went for her again and she brought him home
to Jacksonville where she nursed him during his recovery. At another
time her husband with a serious attack of rheumatism and had
several broken bones. He refused to be taken to a hospital be-
cause he wished to be nursed and cared for by physicians in his own
apartments. At another time he had a serious accident at the
Detroit, and she nursed him through quite a long illness and
attended to his worldly business. This he returned from Detroit,
he had a serious and alarming wound, and she nursed him and
dressed the wound herself for a long time. The testimony that
many times during these years marriage she financed between him
and that he often promised to marry her and that she married,
but he continually postponed the marriage. The testimony that
she often asked him to marry her and that he never refused to do
so until January, 1916, just before this suit was begun. At one
time she told him that she was going to leave him and go to her
mother's as she did not like to live any longer with him in the
unlawful relation, and he said he begged her to stay with him
said that he would marry her. During the time of the period

he became involved with a married woman, named Levinson, and was sued by her husband, and he then promised plaintiff that he would marry her as soon as he got rid of the Levinson woman, or got that case settled, and that case was settled about the first of the first of January, 1916, by his paying to Mrs. Levinson $2,500. which he said he loaned to her to enable her to get a divorce, and the inference from his testimony is that she paid it to her husband. Appellee was corroborated by a witness as to two of these promises to marry. She also proved that when away from her defendant wrote her many letters and that about three years before the rupture between them he caused her to produce those letters and examined them and told her to burn them all, and she did so. She had, however, kept picture postal cards which he had written her while absent, and these were in evidence. She testified that she stayed with the defendant because she loved him and he loved her. Early in January, 1916, defendant left the rooms occupied by himself and plaintiff, and refused to live with her longer, and began living with Mrs. Levinson, and was living with her and not married to her when this cause was tried about nine months later.

Defendant practically admitted the seduction and the subsequent illicit relations with plaintiff, but claimed that this began at his first interview with plaintiff. He admitted that they lived together for many years, and that she was his mistress. He claimed that he paid enough to discharge the bills. He denied that he had ever promised to marry plaintiff and denied that marriage had ever been mentioned between them until about the close of their living together, and said that she then asked

he became involved with a married woman, [illegible], and was
sued by her husband, and he then [illegible] declarid that he would
marry her as soon as he got rid of his [illegible] wife. [illegible]
that case settled, and that case was settled about [illegible]
the first of January, 1911. By the spring he was [illegible]
which he said he loaned to her to enable her to get a divorce, and
the inference from his testimony is that she [illegible] in her behalf.
Appellee was corroborated by witness as to the [illegible]
to marry. She also proved that when [illegible] with
her many letters and that about [illegible] the engagement
between them he [illegible] her to produce their letters and [illegible]
them and told her to burn them all, and she did so. She [illegible],
however, kept pictures [illegible] and [illegible] her while
absent, and these were in evidence. The testimony [illegible]
with the defendant [illegible] and [illegible]. Early
in January, 1911, defendant left [illegible] and
occupied by himself and plaintiff, and refused to live with her
longer, and began living with [illegible], and [illegible]
her and not marries to her when his wife was [illegible] about nine
months later.

[illegible] testimony [illegible] the [illegible]
subsequent illicit relations with plaintiff, but claimed that
this began at the first [illegible] plaintiff. He admitted
that they lived together [illegible], and that [illegible]
mistress. He claimed that [illegible] to [illegible] the [illegible].
He denies that he had ever [illegible] to marry plaintiff, and claimed
that marriage had never been mentioned between them until about
the close of their living together, and that [illegible]

him to marry her, and he refused, and left her. Some of the incidents of their life together he stated differently from the testimony introduced by the plaintiff.

This, therefore, presented a question for the jury to decide. Not only was she corroborated by her niece, Letty Wilson, formerly Letty Birkel, who lived with her aunt, the plaintiff, in these apartments, until she was married to Wilson, but it was also natural for the plaintiff should seek to have defendant marry her. She would naturally be induced to seek a marriage with him, both because of her affection for him, which was manifested in many ways, and also to relieve herself from the odium of living with him as a mistress, and also that she might have the benefit of his property and of his support. While defendant was satisfied with plaintiff he would be likely to promise marriage. We regard it as clear that the jury were warranted in finding that defendant frequently promised to marry the plaintiff. It is not denied, but admitted, that if there were such promises, they were broken.

Defendant argues that the damages are excessive. His own estimate of his property places its value at nearly $40,000. She had devoted to defendant's service the best years of her life. She had nursed him and personally attended him in serious bodily illness. It is held in Richmond v Roberts, 93 Ill. 472, that all the facts and circumstances existing between the parties before and after the time when the alleged marriage contract was entered into are proper evidence for the consideration of the jury where the engagement is denied. Evidence of this

him to marry her, and he refused, and left her. Some of the incidents of their life together he stated differently from the testimony introduced by the plaintiff.

This, therefore, presented a question for the jury to decide. Not only was she corroborated by her claim, daily visits, formerly lady friend, who lived with her most, the plaintiff, in these conversations, until she was married to Tilney, but it was also natural for the plaintiff should seek to have defendant marry her. She would naturally be inclined to seek a reunion with him, both because of her affection for him, which was manifested in many ways, and also to relieve herself from the odium of living with him as a mistress, and also that she might have the benefit of his property and of his support. While testimony was satisfied with plaintiff's version of the marriage, he regard it as clear that the jury was warranted in finding that defendant frequently promised to marry the plaintiff. It is not denied, but admitted, that if there were promises, they were broken.

Defendant argues that the damages are excessive. His own estimate of his property places his value at nearly $40,000. She had devoted to defendant's service the best years of her life. She had served him and, presumably strengthened his business by her illness. It is held in Robinson v Roberts, 98 Ill. 470, that all the facts and circumstances relating towards the parties before and after the time when the alleged marriage contract was entered into are proper evidence for the consideration of the jury where the engagement is denied. Evidence of the

character in such a case is strongly supported by what was said by the appellate court, fourth district, through Mr. Justice Duncan, in Fritzinger v Ahrens, 151 Ill. App. 396. We are of opinion that it is inevitable that plaintiff's unselfish devotion to defendant for so many of the best years of her life would naturally and necessarily influence the jury in fixing the amount of damages, and would be likely to have such influence upon any other jury. We would not be warranted in disturbing the verdict on the ground that the damages are excessive.

Defendant claims that there were errors in the admission of this testimony. The admission of what plaintiff paid out of her own funds for household expenses and what he did not pay, was originally introduced under the common counts in assumpsit. At the close of all the evidence the court held that this evidence was only competent as tending to show and illustrate the relations between the parties. Plaintiff then withdrew the common counts and the court then permitted that evidence to stand for that purpose only, and we approve that ruling.

Plaintiff seriously contends that on the re-cross examination of the witness, John McAllister, plaintiff was permitted to prove an attempt by defendant to effect a compromise, and it is contended that this was error, Plaintiff's counsel did ask questions on that re-direct examination which were improper, but the court sustained objections thereto. The court permitted only one question to be answered. It was as follows: "Q. Did you or not, in company with George Lyons, after this suit was brought and after Mr. Powers had left No. 521 Main Street, go up to the apart-

character is such a case inadvertently supported by what was said by the appellate court, fourth district, through [illegible], in Pritchinger v Ahrens, 127 Ill. App. 2d. [illegible] It is inevitable that plaintiff's unofficial decision is rendered for so many of the best years of her life would materially and necessarily influence the jury in fixing the amount of damages, and would be likely to have such influence upon any other jury. We would not be warranted in disturbing the verdict on the ground that the damages are excessive.

Defendant claims that there were errors in the admission of this testimony. The admission of what plaintiff did with of her own funds for household expenses and what he did not pay, was originally introduced by the common counts in assumpsit. At the close of all the evidence the court held that the evidence was only competent as tending to show and illustrate the relations between the parties. Plaintiff then withdrew the common counts and the court then permitted that evidence to stand for that purpose only, and we approve that ruling.

Plaintiff earnestly contends that on the re-cross examination of the witness, John Ballinger, plaintiff was permitted to prove an attempt by defendant to effect a compromise, and it is contended that this was error. Plaintiff's counsel did not question on that re-direct examination which were improper, but the court sustained objections thereto. The court permitted only one question to be answered. It was as follows: "Q. Did you or [illegible] in company with Henry Lyons, after this suit was brought [illegible] after Mr. Powers had left Mr. [illegible] street, going to the court-

"ment where Miss Birkel was staying at that time for the purpose of trying to get her, in the interest of Mr. Powers, to drop this suit?" The court overruled an objection to that and the answer was "Yes." Counsel for defendant had sharply cross examined this witness to show that he was unfriendly to defendant and had been for a long time, and the object of this question was to show that he had a friendly feeling for defendant at the time in question and that he went to plaintiff to try to get her in the interest of defendant to drop the suit. He was not asked if he went there by authority of the defendant nor what he said to plaintiff, nor did he so testify, and therefore he did not show any effort by defendant to compromise. The question was proper after the cross examination, which is much abbreviated in the abstract.

Defendant complains that he was much prejudiced by questions and answers about his former wives and about the Levinson woman. Questions were put to him about his former wives which were improper, but the court sustained objections to them. He testified in chief in his own behalf that he had had three wives; that he had intercourse with plaintiff while he was still living with his third wife, and that she got a divorce from him. While some objections were made to questions put to him concerning the Levinson woman, yet his relations with her were also revealed in evidence which he gave without any objection by his counsel. Counsel for plaintiff in an address to the jury spoke of defendant as a monster. The court sustained an objection to this statement, and counsel then without objection, submitted to the jury that the evidence showed the defendant's conduct was monstrous. We do not think this language was unfair in view of the admitted facts in the case.

"Just where did Mrs Ritchie was staying at that time for the purpose of trying to get her, in the interest of a lawyer, to drop this suit?" The court overruled an objection to that and the answer was "Yes." Counsel for plaintiff had largely cross examined this witness to show that he was friendly to defendant and had been for a long time, and the object of this question was to show that he had a friendly feeling for defendant at the time he gave and that he went to plaintiff to try to get her in the interest of defendant to drop the suit. He was not asked if he went there by authority of the defendant nor what he said to plaintiff, nor did he so testify, and therefore he did not show any effort by defendant to compromise. The question was proper after the cross examination, which is much abbreviated in the abstract.

Defendant contends that he was more prejudiced by questions and comments about his former wives and about his Japanese woman. Questions were put to the chief his former wives which were improper, but the court sustained objections to them. He testified in chief in his own behalf that he had had three wives; that he had intercourse with plaintiff while he was still living with his third wife, and that she got a divorce from him. Still some objections were made to questions put to him concerning the Japanese woman, yet his relations with her were revealed in evidence which he gave without any objection by his counsel. Counsel for plaintiff is in error in the very place of defendant as a matter. The court sustained an objection to this statement, and counsel then without objection, admitted to the jury that the evidence showed the defendant's conduct was scandalous. We do not think this language was unfair in view of the admitted facts in the case.

Complaint is made of the refusal by the court of certain instructions requested by the defendant. The instructions are not numbered, either in the record or in the abstract, and for that reason it is difficult to distinguish and to discuss them. The court gave many instructions requested by defendant. The first instruction, in the order of the instructions refused, undertook to direct a verdict where the circumstances recited should have been left to the determination of the jury. Other of the refused instructions were incorrect, and still others were sufficiently embodied in those that were given. We find no reversible error in that regard.

It is contended that the court should have granted a new trial because of newly discovered evidence shown by the affidavit of Wilson, the husband of appellee's niece. She had testified to hearing two promises of marriage by defendant to plaintiff and the last of these she placed on the night before Christmas, 1915. The affidavit ~~of~~ by her husband, who was not living with his wife at the time he made the affidavit, was that in the last part of 1915 he and his wife were living together in Decatur, Illinois, and that he knows that she was in Decatur that night, and the next week was not in Peoria. If this evidence had been heard it would have been far from conclusive. Plaintiff testified that her niece and her niece's husband were at her apartments in Peoria that night. The niece also so testified. The defendant himself testified that he believed she was there at that time, although he was not sure of it. Therefore, there

Complaint is made of the refusal by the court of certain instructions requested by the defendant. The instructions are not numbered, either in the record or in the argument, and for that reason it is difficult to distinguish one from the other. The court gave many instructions requested by defendant. The first instruction, in the order of the instructions refused, undertook to direct a verdict where the circumstances material should have been left to the determination of the jury. Some of the refused instructions were incorrect, and still others were sufficiently embodied in those that were given. No ground for reversible error is shown in that respect.

It is contended that the court should have granted a new trial because of newly discovered evidence made by the affidavit of Wilson, the brother of Ingalls's wife. The last testimony to bearing the question of marriage by the parties is conflicting and the last of them who placed on the night before Christmas, 1913. The affidavit of Ingalls, who was not living with his wife at the time he made the affidavit, was that in the last part of 1910 he and his wife were living together in Los Angeles, and that he knew that she was in Los Angeles that night, and the next week was not in Peoria. If this evidence had been heard it would have been for the consideration. Plaintiff testified that her mother and her already lived with the defendant in Peoria that night. The other also so testified. The defendant himself testified that he believed he was there at that time, although he was not sure of it. Therefore, here

would have been a clear preponderance against Wilson if he had so testified. But Wilson states in the affidavit that he and his wife were in Peoria about a week later, and if it had turned out that plaintiff and her niece and the defendant were mistaken as to time and had placed the conversation a little earlier than it occurred, that would not have prevented the jury from believing this evidence. The affidavit of Wilson also shows that at this date, in Decatur, his mother and his father and a Mrs. Naylor were present. Their affidavits could have been procured if Mrs. Wilson was in fact in Decatur and not in Peoria on Christmas Eve, 1915. The affidavit did not warrant the granting of a new trial.

The judgment is therefore affirmed.

would have been a clear prejudicial error against Wilson if he had
o testified. But Wilson claims on the affidavit that he and
his wife were in Pueblo about a week later, and if it had come
out that plaintiff had for alone had the defendant were mistaken
as to time and had placed the conversation a little earlier than
it occurred, that would not have prevented the jury from be-
lieving this evidence. The affidavit of Wilson also shows
that at this date, in Pueblo, his mother and sister had a
fire. Taylor were present. Her affidavits would have corro-
borated if the affidavit was in fact in Pueblo and not in Denver on
Thursday, July. The affidavit did not warrant the grant-
ing of a new trial.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 432

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6438

Fred Sauer, appellant.

208 I.A. 432

vs Appeal from Co. Ct. Kane.

Isaac Cohien, et al appellees.

Dibell, J.

On September 23, 1915, Fred Sauer sued Isaac Cohien and Rachael Cohien in assumpsit in the County Court of Kane County and filed therein a declaration with an affidavit of claim, the sufficiency of which has not been questioned. Defendants filed a plea of non-assumpsit and a notice of special matter by way of set off or recoupment and an affidavit of merits. On motion of plaintiff the court struck this affidavit from the files and gave defendants leave to file an amended affidavit. Thereafter defendants filed another plea of the general issue and an affidavit of merits by the attorney for the defendants. Plaintiff moved to strike from the files said last affidavit and all of the pleadings filed by defendants and to enter judgment for plaintiff for the amount stated in his affidavit of claim. This motion was denied and the cause came on for trial and defendants moved that the suit be dismissed for want of prosecution and this motion was granted, and there was a judgment against plaintiff for costs and plaintiff prosecutes this appeal therefrom.

Our views upon the force and effect of Section 55 of the Practice Act of 1907 and the reasons and authorities therefor, are stated by us in Gen. No. 6410 Reidig v Looney ____ Ill. App. _____ in which we file an opinion this day, and those views need not here be repeated. Plaintiff's affidavit of claim stated that his demand was for rent of his store building on Grove Avenue in the city of Elgin, Illinois, for December 1912, and September 1915 and interest thereon, and that there

Gen. No. 8420

208 I.A. 432

Fred Bauer, appellant,

vs. Appeal from Ct. Cons.

Isaac Cohlen, et al appellees.

Dissell, J.

On September 20, 1918, Fred Bauer sued Isaac Cohlen and Rachael Cohlen in assumpsit in the County Court of Cook County and filed therein a declaration with an affidavit of claim, the sufficiency of which has not been questioned. Defendants filed a plea of non-assumpsit and a notice of special matter by way of set off or recoupment and an affidavit of merits. On motion of plaintiff the court struck this affidavit from the files and gave defendants leave to file an amended affidavit. Thereafter defendants filed another plea of the general issue and an affidavit of merits by the attorney for the defendants. Plaintiff moved to strike from the files said last affidavit and all of the pleadings filed by defendants and to enter judgment for plaintiff for the amount stated in the affidavit of claim. This motion was denied and the cause came on for trial and defendants moved that the suit be dismissed for want of prosecution and this motion the court granted, and there was a judgment against plaintiff for costs and plaintiff appeals to assess this a real statutes.

Our views upon the facts and effect of Section 18 of the Practice Act of 1907 and the decisions and authorities therefor, are stated by us in Gen. No. 8418 Dissell v. Bauer ____ Ill. App. ____ in which we file an opinion this day, in which these views need not here be repeated. Plaintiff's affidavit of claim stated that Mr. Bauer was for work of his where building on Grove Avenue in the city of Elgin, Illinois, for December 1918, and September 1919 and interest thereon, and that there

was due him therefor $766.56. The first affidavit of merits by defendants stated that they verily believed they had a good defense to the suit upon the ~~xxxxxx~~ merits to the whole of plaintiff's demand. This affidavit would have been sufficient under the Practice Act in force prior to July 1, 1907, but section 55 of the latter act now in force, requires that the affidavit of merits shall specify the nature of the defense. This affidavit was therefore insufficient and was properly stricken from the files. The second affidavit of merits was made by the attorney and agent of the defendants and stated that he verily believed that the defendants had a good defense to the suit upon the merits to the whole of the plaintiff's demand. He then stated that the defendants would give in evidence and insist that at the time of the commencement of the suit plaintiff was and still is indebted to defendants in the sum of ~~xxxxxx~~ $1,440. composed of the items thereinafter set forth, and that this amount arises out of the claim or demand for which plaintiff brought this suit and that the items so claimed by defendants are as follows, stating various items and amounts. The affidavit did not swear that plaintiff was so indebted for any of said items, or that these items arose out of the claim of plaintiff or that he believed there was any such defense. Where said Section 55 requires the defendant to specify the nature of his defense in the affidavit of merits, we are of the opinion that it intended that that specification should be under oath. Here the affidavit only swore that the defendants would give in evidence and insist upon those items. We think he should have sworn to the truth of those items and that therefore his affidavit was insufficient. As to the most of those items there is no statement, even in the form adopted, from which it could be seen how the items could arise out of plaintiff's claim. His claim was for rent of a store building on Grove Avenue, for

two specified months. The items so stated in the affidavit of merits by defendant's attorney were for amounts paid to a special cloak man; to a special window decorator; for storage and cartage; for "rent of store, Fosgate Hotel Building," (which is not alleged to be plaintiff's store,) for expenses cleaning up Sauer store building; and for storing and cartage and discount on goods purchased, because of plaintiffs failure to deliver store; and to loss of use of store for a certain time, not including the dates in plaintiff's affidavit of claim. We conclude that most of these items are not sufficiently stated, and if one of them is, it is for a less amount than was due the plaintiff according to plaintiff's claim. Under the law as we understand it, defendants by this affidavit conclusively admit that they owe plaintiff $736.56 for the rent of his store for the two months named. When the case was called for trial the bill of exceptions does not disclose that plaintiff refused to proceed or that there was a jury present, so that he could be forced to trial, and if the jury had been waived, plaintiff's cause of action was admitted and it was for the defendants to introduce proof under their affidavit, if it had been sufficient. As the matter stands the court should have granted the motion to strike the affidavit and defendants' pleas from the files and should have entered judgment for plaintiff as requested, unless defendants obtained leave to file another amended affidavit. Plaintiff asks us to enter judgment here or to direct a judgment in the court below, but we conclude that defendants should be given a brief time to file an amended affidavit if they so desire.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

two specified months. The items so stated in the affidavit of merits by defendant's attorney were for amounts paid to a small clock manufacturer for special clocks for laboratory; for storage and cartage; for "rent of store, Pacific Hotel Building," (which is not alleged to be plaintiff's store,) for expenses running up their store building; and for storing and cartage and discount on goods purchased, because of plaintiffs failure to deliver goods; and to loss of use of store for a certain time, not including the rates in plaintiff's affidavit of claim. It concerns that most of these items are not sufficiently stated, and if one of them is, it is for a less amount than was due the plaintiff according to plaintiff's claim. Under the law as we understand it, defendants by this affidavit, conclusively admit that they owe plaintiff $[illegible] for the rent of our store for the two months named. When the case was called for trial, a jury, all exceptions were not disclose that plaintiff refused to proceed or that there was a jury present. So that we could be limited to trial, but if the jury had been waived, plaintiff's cause of action was undisputed, and it was for the defendants to produce proof under their affidavit, if it had been qualified. As the matter stands the court should have granted the motion to strike the affidavit and defendants' pleas from the files and should have entered judgment for plaintiff as requested, unless defendants obtained leave to file, another sufficient affidavit. Plaintiff asks us to enter judgment here or to direct a judgment in the court below, but we consider that defendants should be given a reasonable time to file an amended affidavit if they so desire.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this ninth day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 441

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6444

Frank C. Strickland, et al
appellees.

vs

Chester A. Sankiewicz, appellant.

208 I.A. 441

Appeal from Lake.

Dibell, J.

The record before us appears to be an appeal from the circuit court of Lake County to review some judgment there. Rule 16 of the Rules of Practice of this court (137 Ill. App. 625) requires the party bringing a cause to this court to file an abstract, which shall state in a concise form the pleadings, interlocutory orders and the judgment or decree. The abstract filed by appellant in this case does not contain the process, the pleadings, or any interlocutory order or the judgment, or any prayer or order of appeal or leave to file a bill of exceptions or an appeal bond, nor does it contain the first part of a bill of exceptions. The recital of a judgment in the bill of exceptions is not a judgment. If we are to adhere at all to our rules, this appeal should be dismissed. Looking into the bill of exceptions to see if any injustice has been done, we find that plaintiff below only asked a verdict for $416.66 but that a verdict was returned by direction of the court, finding against the defendant in debt for $766.66 and in damages for $416.66 and that there was a judgment that plaintiffs recover both said sums and their costs and have execution therefor. If the pleadings and the issues were in debt and if the judgment was otherwise proper, it should have provided that the debt be satisfied upon the payment of the damages and that execution issue only for damages and costs. But as appellant did not abstract the pleadings and the judgment, he should pay the costs of this court.

The judgment is therefore reversed and the cause remanded, at

Gen. No. 8444

Frank C. Stuckland, et al
appellees.

vs

Chester A. Zemkiewicz, appellant.

Appeal from Lake.

208 I.A. 441

Dibell, J.

The record before us appears to be an appeal from the circuit court of Lake County to review some judgment there. Rule 10 of the Rules of Practice of this court (147 Ill. App. 888) requires the party bringing a cause to this court to file an abstract, which shall state in a concise form the pleadings, interlocutory orders and the judgment or decree. The abstract filed by appellant in this case does not contain the process, the pleadings, or any interlocutory order or the judgment, or any prayer or order of appeal or leave to file a bill of exceptions or an appeal bond, nor does it contain the first part of a bill of exceptions. The recital of a judgment in the bill of exceptions is not a judgment. If we are to adhere at all to our rules, this appeal should be dismissed. Looking into the bill of exceptions to see if any liability has been done, we find that plaintiff below only asked a verdict for $[illegible] but that a verdict was returned by direction of the court, finding against the defendant in not for $[illegible], but by damages for $[illegible] and that there was a judgment that plaintiff recover such sum and that costs and have execution therefor. If the pleadings and the issues were in fact and if the judgment was otherwise proper, it should have reached that the jury by satisfied upon the payment of the damages and that execution issue only for damages and costs. But be important it not affect the pleadings and the judgment, it should say the costs of this court.

The judgment is therefore reversed and the cause remanded, at

the costs of appellant, with directions to the court below to enter a proper judgment upon the verdict.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this ninth day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6457.

208 I.A. 462

John J. Dillon, appellant

vs Appeal from Peoria.

Peoria Railway Company, appellee

Dibell, J.

Plaintiff was driving on a public highway when an electric street railway car came up behind him and struck the rear of his buggy and seriously injured the buggy and himself. He brought this suit against the defendant, which operated said street railway line, to recover damages for said injuries. Upon a jury trial there was a verdict and a judgment for the defendant and plaintiff appeals.

The accident happened upon a highway known as West Washington Street, which connects Peoria and East Peoria. The lawyers and the witnesses say that highway runs east and west and we shall so treat it, though a plat in evidence does not support that statement. Plaintiff was driving east with a horse and buggy carrying in the back part of the buggy cases of ale in the line of his business. The east bound street railway track was on the south side of the highway and the west bound track on the north side of the highway, with the space for public travel between. Plaintiff was driving east and next to the east bound track and far enough away from the track so that he could not be hit by a street railway car. Just before the accident he turned to the south to give plenty of room to an automobile, which was approaching from the east on the north side of the travelled way. He first testified that he turned towards the railroad track about one hundred or two hundred feet from the place where he was struck. Afterwards he said it was less than one hundred feet, and he finally testified that he drove about twenty five feet after he turned in the way of the car before

Can. No. 0187.

John J. Dillon, appellant

vs

Portis Railway Company, appellee

Appeal from Peoria.

Dillon, J.

Plaintiff was driving on a public highway when an electric street railway car came up behind him and struck the rear of his buggy and seriously injured the buggy and himself. He brought this suit against the defendant, which operates said street railway line, to recover damages for said injuries. Upon a jury trial there was a verdict and a judgment for the defendant and plaintiff appeals.

The accident happened upon a highway known as West Washington Street, which connects Peoria and East Peoria. The lawyers and the witnesses say that highway runs east and west but we shall so treat it, though a plat in evidence does not support that statement. Plaintiff was driving east with a horse and buggy carrying in the back part of the buggy some of his in the line of his business. The east bound street railway track was on the south side of the highway and the west bound track on the north side of the highway, with the space for public travel between. Plaintiff was driving east but went to the west bound track and far enough away from the track so that he would not be hit by a street railway car. Just before the accident he turned to the south to give plenty of room to an automobile, which was approaching from the east on the north side of the travelled way. He first testified that he turned toward the railroad track about one hundred or two hundred feet from the place where he was struck. Afterwards he said it was less than one hundred feet, and he finally testified that he drove about twenty five feet after he turned in the way of the car before

he was struck. He was very familiar with that highway, and he had travelled it every week or so for several years. The highway was straight for a long distance each way. He did not testify whether he looked back before turning in the way of the car. If he did look back, he must have seen this car close at hand, which was running about twelve or fifteen miles per hour and was lawfully making that speed, and it was negligence for him to drive directly in front of the car which he saw approaching. If he did not look back, then he was negligent in turning in to the space which would place him in front of an approaching car without first looking back. It is clear that according to his own evidence, he was negligent and that that negligence caused the injury. The evidence of the motorman driving the car, and of passengers on the car, makes it muchmore clear that plaintiff was negligent in turning into the track just ahead of the car, but taking it upon plaintiffs evidence alone, we are of opinion the jury could not have done otherwise than to find a verdict against him. There are at least two instructions, given for defendant, which were carelessly drawn and which should have been modified, and perhaps one ruling of the court upon the evidence was not strictly accurate. It is unnecessary that we discuss these questions because, in any event, the verdict could not have been for plaintiff, or, if a verdict and a judgment had been returned for him, it must have been reversed. In such case, such errors as are here discussed would not justify a reversal. The authorities on that subject are collected in Stewart v Clark, 194 Ill. App. 2.

The judgment is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this ninth day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 463

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 9459

Fred Offner, Appellee

vs

Fred Wilke, Appellant.

Appeal from Co. Ct. Will.

208 I.A. 463

Dibell, J.

An automobile owned and driven by plaintiff and in which members of his family were riding with him, and an automobile owned by defendant and driven by defendant's son, riding alone, came into collision upon a public highway in Will County and plaintiff's automobile was damaged. He sued defendant to recover damages therefor in the county court of Will County and alleged that the injury was caused by the negligence of defendant's son in running said car, and had a verdict and a judgment for $325.00 from which defendant appeals.

About half a mile south of the village of Monee is a sub-station of an electric interurban railway, which to that point from the south follows the line of the Illinois Central Railroad, and there turns east. A highway comes to that point from the south and from thence to the village follows the line of said railroad. A short distance north of the sub-station is a rise of ground, over which the travelled part of the highway is narrow and is guarded on each side by a fence, and then the road widens out to its regular width with a ditch on the east side and none on the west side. Plaintiff lived some two and one half miles south of the village and came north in the early evening of October 23, 1913, driving his car and passed over this knoll and into the wide part of the road to the north. At the same time defendant's son, driving defendant's automobile, came from the north. The preponderance of the evidence is that plaintiff say the other automobile was approaching rapidly and he drew to the east to within about one foot of the ditch and so that his automobile was almost

Gen. No. 8408

Fred Otter, appellee

vs

Appellate Ct. St. Will.

Fred Wise, appellant.

Direct, 1.

An automobile owned and driven by plaintiff and in which members of his family were riding, and an automobile owned by defendant and driven by defendant's son, riding alone, came into collision upon a public highway in Will County and plaintiff's automobile was damaged. He sued defendant to recover damages therefor in the county court of Will County and alleged that the injury was caused by the negligence of defendant's son in running said car. And had a verdict and a judgment for $125.00 from which defendant appeals.

About half a mile south of the village of Norma is a sub-station of an electric interurban railway, which is that point from the south follows the line of the Illinois Central Railroad, and there turns east. A highway comes to that point from the south and from there on the village follows the line of said railroad. A short distance north of the sub-station is a rise of ground, over which the travelled part of the highway is narrow but is graded on each side to a level, and from the west side come out to the highway with a clear view to the east side and more on the west side. Plaintiff lived west two and one half miles south of the village and came north in the early evening of October 22, 1921, driving his car passed over this knoll and into the wide part of the road to the north. At the same time defendant's son, driving defendant's automobile, came from the north. The preponderance of the evidence is that plaintiff was the first arrive at the approaching rapidly and is more to the east to within about one foot of the ditch but so that his automobile was closer

entirely out of the beaten or travelled track, leaving to defendant's son nearly all of the beaten way and grass beyond it without a ditch to the west fence of the highway. Defendant's automobile struck plaintiffs automobile back of the left front whell. There was evidence tending to show that plaintiff was driving about twelve miles per hour and that defendant's automobile was driven much faster. Without citing the details of the evidence of each witness, we think it sufficient to say that the jury were clearly warranted in finding that the collision was caused by the negligence of defendant's son in driving his automobile and that plaintiff was not guilty of negligence in the manner in which he drove his machine.

Defendant contends that he is not liable for the negligence of his son. Defendant lived in Mones and had a business there which did not require the use of his automobile. He bought it for his own health and for the comfort and use of his family. Sometimes he drove it, but it was generally driven by his son and the son took various members of the family including his father, for drives in the village and in the surrounding country. Sometimes the son worked for the father in his place of business. On the evening in question the automobile had been in use and was near defendant's place of business and defendant told his son to take it to the garage where it was kept when not in use. The son started the machine, but instead of going directly to the garage, he first drove down to the sub-station for the purpose of seeing a man who worked there. He had not asked his father's permission to go there at that time nor did his father know that he was going there then, but the son testified that when he was told to put the machine away at night, he was accustomed to running around the village some before placing the machine in the ~~grx~~ garage. We are of the opinion that under such circumstances the father was liable for the

negligent acts of the son while running said automobile. This subject is discussed in McNeil v McKain, 41 L. R. A. (N. S.) 775 (Okla); Birch v Abercrombie, 50 L. R. A. (N. S.) 39, 74 Wash. 486; and Kayser v VanNest, 51 L. R. A. (N. S.) 970, 135 Minn. 277; and in the notes to the first two of said cases in the L. R. A. and by us in Gen. No. 6412 Smith v Tappan _____ Ill. App. _____. in which we file an opinion this day, and we there cite other cases to the like effect.

Plaintiff sent said automobile to be repaired and it was so repaired and returned to him at a cost of $375. besides some old tires given to the repairer for some work he did that was not ascertained at first to be necessary. It is urged that it did not sufficiently appear that only such repairs were made as were required to restore the machine to the condition in which it was just before the injury, nor that the prices paid were reasonable for that work. Upon a careful examination of the evidence we conclude it was sufficiently shown that these were reasonable and necessary repairs at the reasonable and customary prices.

Plaintiff paid the company in Chicago which made the repairs $35.00 for hauling said machine to Chicago, after he ascertained that it would cost that much or more to get it to said place in Chicago by railroad, We find no evidence in the record that it was reasonably necessary to send this machine to Chicago for repairs. There was a repair shop in Monee and the keeper of that shop was considered competent by the plaintiff to testify to the nature and reasonable cost of the repairs that were needed. It was not proved that there was not some nearby town where the machine could have been repaired. The machine was not so badly injured but that plaintiff was able to and did drive it to the village of Monee that night. We conclude that the evidence does not show the necessity for taking the

machine to Chicago, nor any right to recover the cost thereof from defendant.

It was about two months from the time the automobile was injured till the plaintiff got it back. He testified that the loss of the use of the machine was worth about $60. The jury seem to have allowed him $35. therefor. There was no proof that this machine was repaired and returned to plaintiff as soon as it reasonably could be, or that it required two months time to make these repairs. Furthermore, no claim is made in the declaration for any such loss, but the damages claimed in the declaration are confined strictly to the expense of repairing the automobile. This matter was referred to in the bill of particulars, but a bill of particulars may limit but cannot enlarge the claims alleged in the declaration. Plaintiff asked and was granted leave to amend, but he did not amend the declaration, and leave to amend is not an amendment. Wis. Centk. R. R. Co. v Wieczorek, 151 Ill. 579. Shinsheimer v Skinner Mfg. Co. 165 Ill. 116, Landt v McCullough, 206 Ill. 214. We therefore conclude that under this declaration and proof plaintiff was only entitled to recover the $375 paid for the repair of the automobile.

We have assumed that plaintiff is ebtitled to recover the reasonable and necessary expense of repairing the machine, so as to restore it to its condition just before the collision. In Gen. No. 6451, McDonell v L. E. & W. R. R. Co. in which we file an opinion this term, we have occasion to discuss the question whether that is the true rule of damages in such case. Here, however, both parties concede in their briefs that the rule above stated is correct. The parties are therefore bound by their position, so taken.

As soon after the collision as plaintiff had got his family together and seen something of the condition of the automobile,

machine in Chicago, but any right to recover from that interest from defendant.

It was about two months from the time the automobile was injured till the plaintiff got it back. He testified that the loss of the use of the machine was worth $40. The jury seem to have allowed him $10. Therefore, there was no proof that this machine was repaired and returned to plaintiff as soon as it reasonably could be, or that it required some more time to make these repairs. Furthermore, no claim is made in the declaration for any such loss, but the damages claimed in the declaration are confined strictly to the expense of repairing the automobile. This matter was raised as to the bill of particulars, but a bill of particulars may limit but cannot enlarge the claims alleged in the declaration. Plaintiff asked and was granted leave to amend, but he did not amend the declaration, and leave to amend is not an amendment. Mfg. Co. R. R. Co. v Wiscoxen, 163 Ill. 378. Schmidtmann v Schmidt Mfg. Co. 180 Ill. 218. Smith v McCullough, 200 Ill. 34. The three-horse machine that make this determination and proved plaintiff was only entitled to recover the $10 paid for the repair of the automobile.

We have assumed that plaintiff is entitled to recover the reasonable and necessary expense of repairing the machine, so as to restore it to its condition just before the collision. In Can. No. 1837, McCormick v. T. & N. R. R. Co. we held an opinion this term, we have occasion to discuss the question whether that is the true rule of damages in such case. There, however, such particular question in that which is such true rule does not lie matter. The jurisdiction was therefore upon by their position, we hold.

As soon after the collision as plaintiff had got his family together and been satisfied of the condition of the automobile,

he went south a short distance to where defendant's automobile had been stopped by running into a post, and he there had a conversation with defendant's son, in which the latter said that he did not see plaintiff coming and that he was only going thirty miles per hour. He said this was about ten minutes after the collision. It is argued that this evidence related to a period so long after the collision that it was not competent evidence against the defendant. In Davids v People, 194 Ill. 178, ong. 189 the following language is used upon this subject. "Whenever it becomes important to show, upon the trial of a cause, the occurrence of any fact or event, it is competent and proper also to show any accompanying act, declaration or exclamation which relates to, or is explanatory of, such fact or event. Such acts, declarations or exclamations are known to the law as res gestae. (Lander v People 104 Ill. 248.)

'Declarations to be a part of the res gestae, are not required to be precisely concurrent in point of time with the principal fact, if they spring out of the principal transaction, if they tend to explain it, as voluntary and spontaneous, and are made at a time so near it, as to preclude the idea of deliberate design; then they are to be regarded as contemporaneous, and are admissible.'"

This rule was followed in Fowler v C. & W. I. R. R. Co., 184 Ill. App. 123, on pp. 131 and 132, in October 1913; and a table in the front part of 186 Ill. App. shows that in that case the supreme court denied a certiorari, thereby apparently approving the decision there made on this subject. Under these authorities we are of opinion that this statement by plaintiff's son and agent was made so near the time of the accident as to preclude the idea of any premeditation by plaintiff's son or any purpose by him to manufacture testimony against his father. We therefore hold the court did not err in admitting said

testimony.

We find no reversible error upon the rulings of the court upon the evidence and the instructions, except as to said sum paid for carrying the machine to Chicago and as to the allowance by the jury for the loss of the use of the machine. This opinion will be lodged with the clerk and the parties notified thereof, and if within seven days, plaintiff, remits $50.00 from the judgment, it will be affirmed in the sum of $375.00 at the costs of appellee in this court. Otherwise it will be reversed and remanded.

Appellee having filed herein a remittitur of $50.00; the judgment is therefore affirmed in the sum of $375.00 at the costs of appellee in this court.

Affirmed with remittitur.

testimony.

We find no reversible error upon the rulings of the court upon the evidence and the instructions, except as to the sum paid for carrying the machine to Chicago and as to the allowance by the jury for the loss of the use of the machine. This opinion will be judged with the clerk and the parties notified thereof, and if within seven days, plaintiff, remits $20.00 from the judgment, it will be affirmed in the sum of $275.00 at the costs of appellee in this court. Otherwise it will be reversed and remanded.

Appellee having filed herein a remittitur of $20.00; the judgment is hereof re affirmed in the sum of $275.00 at the costs of appellee in this court.

Affirmed with remittitur.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this ninth day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

3589

208 I.A. 484

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8399.

Finley Barrel, appellant.

208 I.A. 484

vs Appeal from Lake.

Lake Forest Water Co. appellee.

Niehaus, J.

In this case a bill of equity was filed by appellant Finley Barrel, in the circuit court of Lake County, against the Lake Forest Water Co. a public service corporation organized for the purpose of furnishigg water for private and public use to the residents and people of Lake Forest, and vicinity. The bill prays for an injunction to restrain the water company from shutting off the water on appellant's premises, because of his refusal to pay the bill demanded by the water company, for water furnished appellant's premises during the months of July August and September 1913; and it is alleged in the bill that the amount demanded greatly exceeds the amount due for water actually used during that period. It is alleged also that appellant resides on large grounds in the city of Lake Forest upon which he maintains not only his residence, but a garage green house, stables, a garden, and pools of water; the water which he uses in connection therewith, being supplied by the appellee at a certain price per hundred gallons; and that it is measured by five different meters situated upon his premises; and that bills are rendered to consumers quarterly on the first day of January, April, July and October each year; that the meters in question did not correctly register the amount of water passing through them during the quarter mentioned; that they are known as "fast meters"; and that therefore registered amounts of water was excessively large; and largely in excess of the amount actually used upon the premises during the period stated. A temporary injunction was granted and issued;

Con. No. 8888.

Tinley Barrel, appellant.

vs

Lake Forest Water Co. appellee.

Mishawa, J.

In this case a bill of equity was filed by appellant Tinley Barrel, in the circuit court of Lake County, against the Lake Forest Water Co. a public service corporation organized for the purpose of furnishing water for private and public use to the residents and people of Lake Forest, and authority. The bill prays for an injunction to restrain the water company from shutting off the water on appellant's premises, because of his refusal to pay the bill rendered by the water company, for water furnished appellant's premises during the months of July August and September 1913; and in its answer in the bill that the amount demanded greatly exceeds the amount the water actually used during that period. It is alleged that appellant resides on large grounds in the city of Lake Forest upon which he maintains not only his residence, but a large green house, stables, a garden, and pools of water; the water which he uses is consumption free-ish, being supplied by the appellee at a certain price per hundred gallons; and that it is measured by five different meters attached upon his premises; and that bills are rendered to consumers monthly on the first day of January, April, July and October each year; that the meters in question bill for inherently register the amount of water passing through them during the quarter mentioned; that they are known as "flat rotary"; and that therefore registered amounts of water are excessively large; and largely in excess of the amount actually used from the premises during the period stated. A temporary injunction was granted and issued

208 I.A. 484

and afterwards dissolved on motion; and an appeal was taken from the order of dissolving the temporary injunction to this court; there was a reversal of the order dissolving the temporary injunction and the case was remanded for further hearing Finley Barrel v Lake Forest Water Company, 131 Ill. App. 369. Thereafter the case was reheard upon the motion to dissolve the temporary injunction and the injunction was again dissolved by the order of the court and again came to this court on appeal from such order. We again reversed the cause, remanded it, and held that the status of the case was such, that it should proceed to a hearing upon the merits; and that the temporary injunction should remain in force to maintain the status quo until the final hearing. Barrel v Lake Forest Water Co. 300 Ill App. 539. Upon the remanding of the cause, it therefore proceeded to a final hearing on the merits, and thereupon the court entered a final decree dismissing complainant(s bill for want of equity, and dissolving the injunction which had been issued; the case comes to this court again on appeal from decree last mentioned.

The question now presented is one of fact; namely, whether the appellant proved the allegations of the bill. It was incumbent on the appellant under the allegations made in the bill to prove, that the amount of water registered by the meters upon his premises was not correctly registered; that the meters were of such a character, that they registered excessive quantities. The evidence however strongly tends to show, that there was no defect in the meters which would interfere with their correctly measuring of the water passing through them. Dt also tends to show, that the excessive amount of water used, was probably due to natural and general causes that prevailed in the vicinity of Lake Forest during the period mentioned; and that ~~these causes occasioned the use of much larger quantities of~~

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these causes occasioned the use of much larger quantities of water by consumers in that vicinity during that period in question, than was usual; and this is to some extent shown by the fact that the meters of other large consumers of water who used water for the same purposes, as the appellant; and which water was also measured by meters of a like character; that the meters of the other large consumers showed a large increase in the consumption of water during the period in question. Furthermore it appears that during this period, the water company was compelled to pump an unusually large quantity of water into the mains for consumption, amounting to about 50% more. Under the proof that the allegations of complainants bill were not sustained; and the chancellor properly dismissed the bill for want of equity. Where the proof warrants the conclusions reached by the chancellor on the facts, the decree based thereon should not be disturbed. Com. Nat. Bank v Waggeman 187 Ill. 327. It is contended by the appellee that inasmuch as its answer to the bill of complaint was sworn to; and no replication was filed by the complainant to the answer, that the answer must be taken as true. This position however is not tenable, inasmuch as the cause proceeded to a trial on the issues raised by the pleadings. Where a case is set down for hearing merely upon the bill and sworn answer thereto without replication, then the answer must be taken as true. County of Cook v Great Western R. Co. 119 Ill. 218. But, where the bill waives the answer under oath, the fact, that an answer is sworn to, gives it no force as evidence; it is deemed merely a pleading. Bickerdike v Allen, 157 Ill. 95 Walwork v Derby, 40 Ill. 527; Willenborg v Murphy, 36 Ill. 3[illegible]. Moore v Hunter 1 Gil. 317. When a case proceeds to a trial upon the pleadings and proofs but without a replication being filed, the filing of a replication is considered as having been waived. Jones v Neely 72 Ill. 449; Maple v Scott, 71 Ill. 50; Chambers v Rowe 36 Ill. 171; Piot v Davis, 241 Ill. 434; Guerin v Guerin,

these causes considered. The use of much larger quantities of water by consumers in that vicinity during that period is questionable, that was usual; and this is to some extent shown by the fact that the meters of other large consumers of water during said period for the same purposes, as the complaint; and which water was also measured by meters of a little character; that the meters of the other large consumers showed a lar g inc ease in the consumption of water during the period in question. Furthermore it appears that during this period, the water company was compelled to pump an unusually large quantity of water into the mains to accomplish, somewhat to about 30% more.

Under the proof that the allegations of complaints will were not sustained; and the defendant properly dismissed the bill for want of equity. Where the proof warrants the conclusions reached by the chancellor on the facts, the decree based thereon should not be disturbed. Com. Ins. Co. v Sprague 187 Ill. 317. It is contended by the appellee that inasmuch as the answer to the bill of complaint was sworn to; and no replication was filed by the complainant to the answer, that the answer must be taken as true. This position however is not tenable, inasmuch as the cause proceeded to a trial on the issues raised by the pleadings. Where a case is set down for hearing merely upon the bill and sworn answer thereto without replication, then the answer must be taken as true. County of Cook v Great Eastern R. Co. 110 Ill. 462. But, where the bill waives the answer under oath, the fact, that an answer is sworn to, gives it no force as evidence; it is issued merely a pleading. Hickerling v Allen, 187 Ill. 97 Malmrk v Duffy, 40 Ill. 347; Williamson v Murphy, 34 Ill. 164. Moore v Turner 1 Ill. 112. When a case proceeds to a trial upon the pleadings and proofs but without a replication being filed, the filing of a replication is considered as having been waived. Jones v Neely 72 Ill. 449; Gaylo v Hoyt, 71 Ill. 30; Chamberlain v Cone 32 Ill. 171; Flint v Davis, 84 Ill. 434; Smith v Smith,

170 Ill. 333. In this case therefore the sworn answer cannot be considered as having any probative force, and the filing of a replication was waived by proceeding to a trial without it.

The decree is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

208 I.A. 485

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

R H Dent Oct 3/17

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8416.

Lena O'Brien, appellant.

vs

Luther Crawford, appellee.

208 I.A. 485

Appeal from Woodford

Niehaus, J.

This suit was brought by the appellant Lena O'Brien in the circuit court of Woodford County, against the appellee Luther Crawford, to recover damages for personal injuries alleged to have been suffered by her on account of the negligence of the appellee, in driving his automobile on the streets of the city of Minonk. The appellant filed a declaration containing four counts; a demurrer was sustained to all of the counts. Thereupon the appellant got leave of court to amend the first second and fourth counts, but elected to abide by the third count. The first, second and fourth counts were amended, and the appellee filed a plea of the general issue thereto. Thereafter a jury was called, and the trial entered upon. At the conclusion of the evidence for the plaintiff, the appellee moved the court to exclude the evidence, and to find the defendant not guilty; and tendered an instruction to that effect; the plaintiff entered a cross motion asking leave to amend the fourth count and with the motion tendered the proposed amendment; the motion was allowed, and the amendment filed. The appellant thereupon withdraw the first and second counts of the declaration; The appellee thereupon demurred to the amended fourth count, and upon consideration of the demurrer, the court discharged the jury, and finally sustained the demurrer to the fourth count as amended; appellant abided by the fourth count as amended, and the court entered judgment on the demurrer, in bar against her, and for costs; from this judgment an appeal is taken.

The questions arising on the appeal, concern the suf-

Gen. No. 8818.

Dem O'Brien, appellant.

vs

Appeal from Woodford

Luther Crawford, appellee.

Michaud, J.

This suit was brought by the appellant Dem O'Brien in the circuit court of Woodford County, against the appellee Luther Crawford, to recover damages for personal injuries alleged to have been suffered by her on account of the negligence of the appellee, in driving his automobile on the streets of the city of Minonk. The appellant filed a declaration containing four counts; a demurrer was sustained to all of the counts. Thereupon the appellant got leave of court to amend the first second and fourth counts, but elected to stand by the third count. The first, second and fourth counts were dismissed, and the appellee filed a plea of the general issue thereto. Thereafter a jury was called, and the trial commenced again. At the conclusion of the evidence for the plaintiff, the appellee moved the court to exclude the evidence, and to find the defendant not guilty; and tendered an instruction to that effect; the plaintiff entered a cross motion asking leave to amend the fourth count and with the motion tendered the proposed amendment; the motion was allowed, and the amendment filed. The appellant dismissed without the first and second counts of the declaration. The appellee thereupon insisted to the second fourth count, and upon consideration of the demurrer, the court discharged the jury, and finally sustained the demurrer to the fourth count as amended; appellant called to the fourth count as amended, and the court entered judgment on the demurrer, in favor against her, and for costs; from this judgment an appeal is taken.

The questions arising on the record, concern the sufficiency of the fourth count as amended, and the ruling of the court in sustaining the demurrer thereto.

208 I.A. 485

ficiency of the third count of the original declaration, and the fourth count as amended, to which demurrers were sustained. The third count is as follows: "And for that whereas the defendant on to wit, the tenth day of October A. D. 1915, was the owner and possessed of a certain vehicle, commonly called an automobile and on the day aforesaid was engaged in running and operating the same along and upon a certain public highway in the city of Minonk, in said county, and the plaintiff avers that it was the duty of said defendant in the running and operating of said automobile along and upon any and all public highways, to exercise due care and caution so as to prevent accidents and injuries to persons riding and being conveyed in vehicles drawn upon such highways; yet the defendant contrary to and in violation of his duty in that behalf, so carelessly and negligently ran and operated said automobile upon said public highway, on the day aforesaid, that by means thereof while the plaintiff in the exercise of due care was riding along said highway in a single buggy, drawn by a horse, driven by the husband of the plaintiff the said defendant then and there drive and ran said automobile into the horse driven by the husband of the plaintiff as aforesaid, and then and there causing said horse to become frightened and to run away; by means whereof the plaintiff was violently thrown from said buggy to and upon the ground there, and divers bones of her body were broken, and she received a great shock to her whole system, and she became sick, sore and lame, and has so ever since remained, and during the whole of said time she has suffered great pain, and by means thereof become liable to and has paid out large sums of money in being doctored and nursed for her injuries, so received as aforesaid, and she avers that said injuries are permanent; wherefore she says, a cause of action has accrued to her, to her damage in the amount of $10,000.00, therefore she brings her suit, etc."

Pleaded by the third count of the original declaration, and the fourth count as pleaded, to which demurrers were sustained. The third count is as follows: "And for that cause the defendant on to wit, the tenth day of October A. D. 1913, was the owner and possessed of a certain vehicle, commonly called an automobile and on the day aforesaid was engaged in driving and operating the same along and upon a certain public highway in the city of Minonk, in said county, and the plaintiff alleges that it was the duty of said defendant in the driving and operating of said automobile along and upon said and all public highways, to exercise due care and caution so as to prevent collisions and injuries to persons riding and being conveyed in vehicles upon such highways; yet the defendant entirely to his violation of his duty in that behalf, so negligently and negligently ran and operated said automobile upon said public highway, so the said aforesaid, that by means thereof while the plaintiff in the exercise of due care was riding along said highway in a buggy, drawn by a horse, driven by the husband of the plaintiff the said defendant then and there drove and ran said automobile into the horse driven by the husband of the plaintiff in aforesaid, and then and there causing said horse to become frightened and to run away; by means whereof the plaintiff was violently thrown from said buggy to and upon the ground there, and divers bones of her body were broken, and she received a great shock to her whole system, and she became sick, sore and lame, and has ever since remained, and is now sick, sore and lame, and has suffered great pain, and is about thereof behoved to and has paid out large sums of money in being treated and cured for her injuries, so received as aforesaid, and she avers that said injuries are permanent; wherefore she says, a cause of action accrued to her, to her damage in the amount of $50,000.00, therefore she sues her suit, etc."

The fourth count as amended avers that the appellee on to-wit, xx the tenth day of October A. D. 1913, was the owner and possessed of a certain vehicle commonly called an automobile and on the day aforesaid was engaged in running and operating the same along and upon a certain public highway in the city of Minonk, to-wit: a public street commonly called Chestnut street; and also, upon and along a certain other public highway in said county commonly xxxxxx known as and called East Fifth street; * * * * * * *that it was then and there the duty of the appellee, to use due and reasonable care in driving said automobile at said time, and to so operate the same as to comply with the general usage and customs in vogue in said city, of keeping and driving the same to the right of the center of the street, that he was then on; and to pass all conveyances that he should meet, by turning to the right; and by leaving space enough between his machine and the left side of any streets upon which he was then driving to permit other vehicles meeting him to turn to the right in passing said automobile, and to so operate said automobile, as to use reasonable care to prevent the same from coming into contact with, or running into, any other conveyances on said street. Yet the defendant not regarding his duty in that behalf so negligently, carelessly and improperly operated his automobile upon said streets, and in going around said corner, at the time aforesaid, * * * ** * * that there was not room for any vehicle meeting said automobile to pass, by turning to the right between said automobile and the northeast corner of the intersection of said two streets; and carelessly negligently and improperly drove said automobile into the horse and buggy in which the plaintiff was then and there riding, which then and there was driven by her husband; and negligently and improperly drove said automobile so near to the northeast corner of the intersection of the two streets aforesaid, as to

The fourth count is worded every bit the same as the first count, to-wit, on the 9th day of October A. D. 1919, was the owner and possessor of a certain vehicle commonly called an automobile and on the day aforesaid was engaged in running and operating the same along and upon a certain public highway in the city of Hinoma, to-wit: a public street commonly called Theatre street; and that, upon and along a certain other public highway in said county commonly known as and called Bar Fork street; * * * * * that it was then and there the duty of the appellee, to use due and reasonable care in driving said automobile at said time, and to operate the same so as to comply with the general laws and ordinances in force in said city, of keeping and driving the same to the right of the center of the street, that he was then and there and in place aforesaid, that he should meet, by turning to the right; but on leaving sufficient room upon his machine and the left side of her street upon which he was then driving to permit other vehicles meeting him to turn to the right by passing said automobile, and to so operate said automobile, as to use reasonable care to prevent the same from coming into collision with, or striking into, any other conveyances on said street. The six defendants are charging the duty in that behalf as plaintiff, negatively and improperly operated his automobile upon said street, and in other ways said owner, at the time aforesaid, - - - - - - that there was not room for any vehicle meeting said automobile to pass, by turning to the right between and the automobile and the center of the intersection of said Bar Fork; and negatively negligently and improperly drove said automobile into the same and thereby in doing the plaintiff was thrown and injured, which fact and injury was and was not known to the defendant and improperly drove said automobile on said Bar Fork street in the interest of the the theatre, as is

crown the horse and buggy in which the plaintiff was riding off from the northeast part of said Chestnut street, and over on to and near the northeast corner of the intersection of said streets; and that the said defendant carelessly, negligently and improperly ran and drove said automobile into the horse as aforesaid; whereby the said horse became frightened and unmanageable, and ran away, and upset the buggy in which the plaintiff was then and there riding; whereby the appellant was thrown out of said buggy with great force and violence upon the street and thereby her left arm and wrist were broken, etc. The count in question also contains the necessary averment concerning the exercise of due care by appellant on her part. We are of opinion, that the amended fourth count stated a good cause of action; and that it sufficiently stated facts, from which the inference of negligence on the part of the appellee, and the exercise of due care on the part of the appellant, could be reasonably inferred, and that it was error to sustain the demurrer to said count. The question as to whether the evidence offered at the trial on the part of the appellant contained sufficient proof of the negligence charged in the count or whether there was a variance between the proof and the allegations of the count is not presented by the record. The only question presented for review, is whether the averments contained in the count under consideration, and in the third count sufficiently stated a cause of action. We are of opinion that both counts are sufficient in that regard; that the fourth count as amended, was legally sufficient; and that the third count under the rule announced by the Supreme Court in Chicago City Ry. Co. v Jennings 157 Ill. 274 also stated cause of action; and that the demurrer thereto should have been overruled.

crown the horse and buggy in which the plaintiff was riding off from the northeast part of said Thirteenth street, and over on to and near the northwest corner of the intersection of said streets; and that the said defendants negligently and improperly ran and drove said automobile into the horse so violently; whereby the said horse became frightened and unmanageable, and ran away, and upset the buggy in which the plaintiff was then and there sitting; thereby the plaintiff was thrown out of said buggy with great force and violence upon the street and thereby her left arm and wrist were broken, etc. The court in question also contains the necessary statement concerning the exercise of its care by a plaintiff on her part. The rule of opinion, that the municipal court should state a prima facie of action; and that it sufficiently states facts, from which the inference of negligence on the part of the appellee, and the exercise of due care on the part of the appellant, could be reasonably inferred. Are that it was error in sustain the demurrer to said court. The question as to whether the evidence offered at the trial on the part of the appellant constituted sufficient proof of the negligence charged in the count or whether there was a variance between the proof and the allegations of the court is not presented by the record. The only question presented for review, is whether the averments contained in the court under consideration, and if the trial court sufficiently states a cause of action. We are of opinion that both courts are sufficient in that regard; that the lower court on demurrer, was legally sufficient; and that the trial court under the rule announced by the Supreme Court in Chicago City Ry. Co. v Fredrick 187 Ill. 379 also stated facts of action; and that the demurrer should have been overruled.

For the reasons stated the case is reversed, and cause remanded with directions to over-rule the demurrer to the third count of the original declaration, and to the fourth amended count.

Reversed and remanded with directions.

For the reasons stated the case is reversed, and remanded with directions to overrule the demurrer to the third count of the original indictment, and to sustain demurrer to count.

Reversed and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 487

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6418.

Henry F. C. Harmening,

Deft. in error.

vs

Error to DuPage.

Frank O. Hawley,

Pltf. in error.

208 I.A. 487

Niehaus, J.

In this case a bill in equity was filed by Henry F. C. Harmening, the defendant in error, in the circuit court of DuPage County, against the defendants therein named, Frank O. Hawley, Letitia A. Hawley, J. A. Stalt and Marshall Young, to have a contract for the purchase of certain real estate described therein, entered into between said Henry Harmening and plaintiff in error Frank O. Hawley, declared forfeited, and for other relief.

The plaintiff in error Frank O. Hawley, filed an answer to the bill, to which a replication was filed; the case thereupon proceeded to a final hearing in open court; the bill of complaint being taken as confessed by and against the defendants Letitia A. Hawley, J. A. Stalt and Marshall Young, who were in default.

The chancellor heard the evidence oral and documentary in open court, and the argument of counsel, and entered a decree for the relief prayed for in the bill; and by the terms of which decree the rights and claims of the plaintiff in error Frank O. Hawley to the property involved, were forfeited and annulled. To reverse this decree this writ of error is prosecuted.

Plaintiff in error contends that the decree of the court is null and void, and in support of this contention in his brief makes the following statement of facts concerning the entry of the decree in question; "That on the tenth day of April, 1918, the circuitcourt of DuPage County being in session proceeded to hear the evidence in this case, and after due consideration

Sup. No. 4887.

208 I.A. 487

Henry T. C. Hemenway,

Defr. in error.

vs

Error to Douglas.

Frank O. Hawley,

Plff. in error.

Mikowe, J.

In this case a bill in equity was filed by Henry T. C. Hemenway, the defendant in error, in the district court of Douglas County, against the administrator Charles Lowell, Frank O. Hawley, Letitia A. Hawley, C. A. Black and Burchell Young, to have a contract for the purchase of certain real estate therein, adjudged into between said Henry Hemenway and in error Frank O. Hawley, declared forfeited, and for other relief.

The plaintiff in error Frank O. Hawley, filed an answer to the bill, to which a replication was filed; the case then upon proceeded to a final hearing in open court; the bill of complaint being taken as confessed by and against the defendants Letitia A. Hawley, C. A. Black and Burchell Young, the only in default.

The chancellor heard the evidence and had jurisdiction in open court, and the argument of counsel, and granted a decree for the relief prayed for in the bill; and as the rights of minors before the rights and claims of the plaintiff in error Frank O. Hawley to the property involved, were protected and insulated. To review this decree this writ of error is prosecuted.

Plaintiff in error contends that the decree of the court is null and void, and in support of this contention in his brief makes the following statement of facts concerning the entry of the decree in question:"Out on the 29th day of April, 1898, the plaintiff in error in this case, and after the consideration of the evidence in this case, and after the consideration

thereof orally announced his findings. No decree was entered on said day nor any memorial paper or minute in writing made, showing what the decree was to be, or in whose favor it was. The cause was not taken under advisement, and the defendant made no stipulation that a decree might be entered in vacation; that on the tenth day of April 1916, the court adjourned to Saturday the 15th. day of April A. D. 1916; and on Saturday the fifteenth day of April A. D. 1916 the said circuit court met pursuant to adjournment; and on said day adjourned to Saturday the 20th. day of May A. D. 1916; and on the 27th. day of May A. D. 1916, court adjourned for the term. That after said circuit court had adjourned on the 15th. day of April 1916, the solicitor for the defendant in error, prepared a form of a decree, obtained the chancellors signature to the same and on the 11th. day of May 1916, appeared at the office of the clerk of said court and requested said clerk to file said alleged decree and enter the same on the records of the court. Thereupon said clerk took said form of decree, endorsed thereon the following words and figures "filed May 11th. 1916 Michael Kross Clerk of the Circuit Court of DuPage County, Illinois;" and wrote the alleged decree on the records of said court;" and it is insisted therefore , that the decree in question was not entered in term time and at the time the case was decided by the court; and that the decree was entered of record, after the term had adjourned in vacation, without any stipulation for that purpose, or consent by the plaintiff in error; and therefore under the holding in Cameron v Clinton 258 Ill. 599 is void.

The facts as stated by counsel for plaintiff in error, however, are not borne out by the record. The record shows that the case was heard and decided, and a decree entered in open court, on the 10th. day of April 1916, one of the days of the January Term of court. This record imports verity, and

thereof orally announced his findings. In issue was against on said day nor any memorial paper or minute in writing made, showing what the decree was to be, or in whose favor it was. The order was not taken under advisement, and the interested made no stipulation that a decree might be entered in vacation; that on the tenth day of April 1910, the court adjourned to Saturday the 17th. day of April A. D. 1910; and on Saturday the fifteenth day of April A. D. 1910 the main itself made present to adjournment; and it only by adjourned to Saturday the 30th. day of May A. D. 1910; and on the 27th. day of May A. D. 1910, court adjourned for the term. That after said circuit court had adjourned on the 15th. day of April 1910, the solicitor for the defendant in error, prepared a form of a decree, dividing the commonlaw objecting to the same and on the 27th. day of May 1910, presented at the office of the clerk of said court and requested said clerk to file said alleged decree and enter the same on the records of the court. Thereupon said clerk took said form of decree, endorsed thereon the following words and figures "Filed May 27th. 1910 Michael Rose Clerk of the circuit Court of Jefferson County, Ala-bama;" and wrote the alleged decree on the records of said court; and it is insisted therefore, that the decree in question was not entered in term time and at the time the case was tried by the court; and that the decree was entered of record after the term had adjourned in vacation, without any stipulation for that purpose, or consent by the plaintiff in error; and therefore under the holding in Thomas v Clinton etc 171. 322 is void.

The facts as stated by counsel for plaintiff in error, however, are not borne out by the record. The record shows that the case was tried and decided, and a decree entered in open court, on the 15th. day of April 1910, one of the days of the January Term at court. This record shows conclusively

cannot be contradicted by other evidence; but is conclusive upon the parties to the suit as well, as all others whose interest may be affected thereby. Weigley v Matson, 185 Ill. 64 Jasper v Schlesinger, 83 Ill. App. 637; Richardson v Beldum, 18 Ill. App. 537;Koren v Rosenhald, 7 Ill. App. 546; Ward v White 66 Ill. App. 185.

The evidence of the endorsement of a file mark on the back of the decree by the circuit clerk, dated May 11th. 1916 cannot be regarded as a contradiction of what the record imports nor can the fact that apparently the same decree that was entered on the 10th. of April was subsequently filed for record in the office of the circuit clerk, namely on May 11th. 1916 be regarded as a contradiction of the record; nor is the validity of the decree which the record shows was regularly entered in open court on the 10th. day of April 1916, in any way impaired thereby. The record does not disclose any legal basis for questioning the validity of the decree and it is therefore affirmed.

cannot be contradicted by other evidence; but is conclusive upon the parties to the suit as well, as all other those interest may be affected thereby. Tedjey v Nelson, 187 Ill. 24 Lager v Goldsmiter, 45 Ill. App. 327; Kimberlen v Bellum, 12 Ill. A . 327;Ikten v Rosenbaik, 7 Ill. App. 383; Ware v Ruth 50 Ill. App. 188.

The evidence of the indorsement of a file mark on the back of the bonds by the circuit clerk, dated May 11th, 1894 cannot be regarded as a contradiction of what the record imports nor can the mere fact appearing the same terms that are entered on the docket of April and consequently filed for record in the office of the circuit clerk, merely on May 11th, 1894 be regarded as a contradiction of the record; nor is the validity of the decree which the record shows was regularly entered in open court on the 10th day of April 1894, in any way impaired thereby. The record does not disclose any legal basis for questioning the validity of the decree and it is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 488

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 7 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6463. Agenda 41.

208 I.A. 488

Walter J. McMurray,
Appellee,

-v-

Appeal from Circuit Court
Peoria county.

Peoria Railway
Terminal Company,

Appellant.

Niehaus, J.

This action was brought by Walter J. McMurray, the appellee, in the circuit court of Peoria county against the Peoria Railway Terminal Company, appellant, to recover damages for injuries received through the alleged negligence of appellant.

The appellee was employed by the Peoria & Pekin Union Railway Co., at the time he was injured as switchman, and he was injured while in the performance of the duties of such employment. The injury occurred at a railroad crossing situated south of the southerly limits of the city of Peoria at a point where the tracks of the Minneapolis & St. Louis Railway Co. cross the tracks of the appellant company, and this crossing is also used by several other railroad companies, including the Peoria & Pekin Union Railway Co, for switching, and other railroad purposes, and was in charge and under the control of a flagman who was an employe of the appellant. On the day of the injury the P & P U Co., was switching cars for the M & St. R'y Co., to and from the so-called Bartlett Railroad Yards,

which are situated near the crossing and was backing a cut of about twenty-eight or thirty loaded cars across this intersection of the two railroads mentioned; and when this cut of cars reached the crossing another cut of cars in charge of a switching crew of the appellant company, and running on the tracks of the appellant company, collided with it, whereby the appellee was knocked off of the top of the cars where he was in the performance of his duties, and precipitated to the ground, and injured.

The declaration contains three counts charging the appellant company with negligence. The negligence charged in the first count is, that the cut of cars of the appellant company which ran into the cars of the P & P U.Co., were recklessly and carelessly operated by appellant, and because of such careless and reckless operation, ran into the cars of the P & P U. The second count avers that the flagman employed by the appellant, at the crossing, whose duty it was to give proper signals to on-coming trains, carelessly and negligently signaled the cut of cars upon which the appellee was riding, to come on, which resulted in the injury in question. The third count avers that the appellant negligently and carelessly drove and propelled its cut of cars towards said railroad crossing, without having any person on the forward end of its cut of cars to direct the movements of the cut of cars, and negligently and carelessly failed and neglected to give any warning of its approach towards said intersection, whereby ~~the appellee was injured~~ and negligently and carelessly failed and neglected to stop its cut of cars before reaching

said intersection, whereby the appellee was injured. There was a trial by jury and a verdict finding appellant guilty, and assessing appellee's damages at $2500.00. Appellant made a motion for a new trial and the court required the appellee to remit $1000.00 of the amount fixed in the verdict, and thereupon denied the motion for a new trial, and a judgment was entered against the appellant for $1500.00, from which judgment this appeal is prosecuted. As a ground for reversing the judgment it is urged that the verdict is against the weight of the evidence; that the court refused to admit proper evidence for appellant; that the court gave erroneous instructions for appellee; and that the amount of damages in the judgment is excessive.

Concerning the facts and the cause of the collision the appellee testified that at the time of the injury on June 14, 1915, he was working for the P & P U R'y Co., as a member of a switching crew; that the crew consisted of E.C.Royalty, as foreman, Mr. Erickson, and himself; that the accident happened about three o'clock in the afternoon; that the cut of cars upon which he was working was going down the M.P.U track to be delivered to the M & St L Yards, which were located on the other side of the P.R.T.crossing; that he was on top of the end car, which was approaching the crossing; that there was about twenty-eight cars which were being pushed by an engine; and that he was standing on the car nearest to the crossing for the protection of the train; that the crossing flagman was standing at his usual place at the crossing; that the cars stopped about sixty or seventy yards for the purpose of switching on to the crossing tracks; and that when the train got on to these tracks

said intersection, whereby the appellee was injured. There was a trial by jury and a verdict finding appellant guilty, and assessing appellee's damages at $[illegible]. Appellant made a motion for a new trial and the court required the appellee to remit $[illegible] of the amount fixed in the verdict, and thereupon denied the motion for a new trial, and a judgment was entered against the appellant for $[illegible], from which judgment this appeal is prosecuted. [illegible] is a ground for reversing the judgment it is urged that the verdict is against the weight of the evidence; that the court refused to admit proper evidence for appellant; that the court gave erroneous instructions for appellee; and that the amount of damages in the judgment is excessive.

Concerning the facts and the order of the collision the appellee testified that at the time of the injury on July 12, 1910, he was working for the [illegible] Co., as a member of a switching crew; that the cars involved of I.C.Company, as foreman, Mr. Erickson, and himself; that the [illegible] about three o'clock in the afternoon; that [illegible] upon which he was working was [illegible] to be delivered to the [illegible] Yards, which were located on the other side of the [illegible]; that he was on top of the car, which was approaching the crossing; that there was about twenty-eight cars which were being pushed by an engine; that he was standing on the car nearest to the engine for the protection of the train; that the crossing flagman [illegible] at his usual place at the crossing; that the cars engaged [illegible] sixty or seventy yards for the purpose of switching on to [illegible] crossing tracks; and that when the train got on to the [illegible]

the flagman was in plain sight and that appellee looked for the signal; that the flagman gave the signal to come ahead; that he transmitted the signal to the head man next to the engine, and that it was communicated to the engineer; and that thereupon the train proceeded towards the crossing in question; and that the cars had proceeded almost to the crossing before he noticed anything wrong; that the train was about half way or about thirty yards from the crossing when he saw the P.R.T. switch train; that it was not in motion when he first saw it; that afterwards he saw it back up; that the train was nearly on the crossing when he first saw the P.R.T. train move; that he gave the stop signal immediately and ran back to get out of the way; that he ran back towards the head/end of the train perhaps three or four or five cars, when the trains hit and knocked him off, and caused his injuries. Concerning his injuries the appellee testified substantially as follows:- " I had both wrists sprained and one is not all right yet, but this one I dont feel it any more. I mean the left one isn't all right, I don't know what is the matter with it; it is very sore at times I strain it; I can pull with it, but as to pushing anything, shoving a broomstick or set a brake, or anything like that I cannot do it because it hurts. It is tender. I was able to handle the brake wheel before the accident and I am not able to do it with the hand now. After the accident my eye was out of business for about a week from the cut over the eye. I can see fairly well out of it now, but have to use glasses, which I did not use before the accident. In the day time I can see fairly well, but at night to read I have to use glasses. I have suffered pains as a result of these injuries for about two or three weeks. My head and my

the flagman was in plain sight and that signalling looked for its
signal; that the flagman gave the signal to come ahead; that
he transmitted the signal to the head man next to the engine, and
that it was communicated to the engineer; and that thereupon the
train proceeded towards the crossing in question; and that the
cars had proceeded almost to the crossing before he noticed any-
thing wrong; that the train was about eight or nine hundred
yards from the crossing when he saw the L.S.E. engine train;
that it was just in motion when he first saw it; that otherwise
he saw it back up; that the train was nearly on the crossing
when he first saw the L.S.E. train; that he gave the only
signal immediately and was able to get out of the way; that he
was back inspecting the length of the train perhaps three or four
or five cars, when the crash came and knocked him off, and
caused his injuries. [illegible] the plaintiff stat-
ed substantially as follows:- "I had been which [illegible]
one is not all right yet, but this one I [illegible] I
have the left eye [illegible] right. I don't know what is the
matter with it; it [illegible] at times I always [illegible] I use
pull with it, but [illegible] [illegible] a broken
or not a brake, or anything like that I [illegible] it [illegible]
burn. It is [illegible] I am able to [illegible] the brake wheel
before [illegible] I [illegible] to do it with the [illegible]
After the accident my eye was out of [illegible] for [illegible] weeks
from the cut over the eye. I can see fairly well out of it now,
but have to use glasses. I don't [illegible] [illegible] the glasses.
In the day time I can see fairly well, but at night I can't
have to use glasses. I have [illegible] pain as a result of
these injuries for about two or three weeks. My head [illegible] by

teeth hurt me. I lost one tooth at the time of the accident, and later four others. For three or four weeks after the accident I slept very little. I never had any headaches before the accident, but have them quite a good deal now, sometimes once or twice a week. It was seven weeks and three days before I went to work. My average monthly earnings being about $128.00. I went back to work for the P & P U, and am working for them now as switchman. I am working the field job, and could not set a brake on account of my hand. I worked for four or five days, and then I was off for four or five days. My arm hurt me so, that I could not work. I went back on another job. The job I am on now does not require setting any brakes."

The appellee is corroborated by two witnesses with reference to the giving of the signal to come on, to the P & P U train crew, and also as to the circumstances under which the collision took place. The flagman, who was a witness for appellant, denies that he gave the P & P U train crew a signal to come on; and he is also corroborated by the foreman of the P.R.T. switching crew. The real contest in the case turned upon the question as to whether or not the flagman signaled the P & P U train to come on. There is a clear conflict of evidence upon that point, which is the vital one in the case. To settle this conflict was a question for the jury. The jury believed the appellee and were warranted in doing so under the circumstances, and this court would not be justified in holding that they should not have done so. It is clear that the verdict is not so manifestly against the weight of the evidence that it should be set aside.

teeth hurt me. I lost one tooth at the time of the accident, and later four others. For three or four months after the accident I slept very little. I never had any headaches before the accident, but have them quite often now, sometimes once or twice a week. It was seven weeks and three days before I went to work. My average monthly earnings being about $[illegible]. I went back to work for the A.C.F., and am working for them now as switchman. I am working the full job, and would not be able to stand it if my head. I worked for four or five days, and then I was off for four or five days. My wife has told me, that I could not work. I must look on another job. I am on new job not regular within any bounds."

The appellee is corroborated by the witness [illegible] reference to the giving of the signal to come on, to the P.R.T. train crew, and also as to the circumstances under which the collision took place. The flagman, who was a witness for appellant, denies that he gave the T.R.T. train crew a signal to come on; and he is also corroborated by the foreman of the A.C.F. switching crew. The real contest in the case turned upon the question as to whether or not the flagman signaled the P.R.T. train to come on. There is a clear conflict of evidence upon that point, which is the chief one in the case. Notwithstanding this conflict was a question for the jury. The jury believed the appellee and were convinced in doing so under the circumstances, and this court will not be justified in holding that they should not have done so. It is clear that the verdict is not so manifestly against the weight of the evidence that it should be set aside.

Appellant contends that the court erred in refusing proper testimony offered on the trial; that it offered evidence that in a short switching movement it was not the custom nor was it practicable to have a look out ride on the top of the cars and that this evidence offered, the court refused to admit it. But neither the abstract nor the record discloses any such offer of evidence, nor any questions directed to the proof of any such custom. It does not appear that this matter was brought to the attention of the court either by question or otherwise, nor that the court ruled upon it. The question therefore in this connection is not before us for consideration or decision.

Complaint is also made of the giving of the first and second instructions for the plaintiff. Appellant states that in the first of plaintiff's instructions the court instructed the jury that if they believed from the evidence that the appellee was exercising due care for his own safety and the defendant was negligent, he would have a right to recover damages to the extent sustained, and contends that inasmuch as the appellee was an employe of the P & P U R'y Co., if the P & P U.Co. was negligent, or equally negligent, or contributed to the accident, then the appellant would not be liable, and that the instruction was erroneous because it did not embody this point. While it is true that the appellee would be chargeable with the negligence of the P & P U train crew, in disobeying the flagman's signal, yet the failure to embody this idea in the instruction for appellee did not make it erroneous. The instruction correctly stated the law as far as it went. And it was not necessary to embody in it the point referred to, which was a matter

of defense. Moreover, the point made by the appellant was elaborately embodied in its own instructions, and repeated in them, so that the jury had the full benefit of this legal feature of the case. All the instructions must be considered together, and when so considered in this case they undoubtedly constitute a complete statement of the law especially as applicable to the defense made by appellant. It is also insisted that the instructions concerning prospective damages is erroneous because it contains the suggestion of a right of recovery for future consequences from appellee's injuries, and it is claimed that there is no evidence to support this feature in the instruction. This contention of appellant, however, cannot be sustained, because there is evidence of consequences following appellee's injury, of weakness of sight of the eye that was injured, and of continued trouble with the left wrist which followed the injury; also of intermittent headaches, which appellee continued to suffer from after the injury.

In view of this evidence the instruction was properly given. We do not regard the amount of damages, as reduced by the remittitur, and for which judgment is entered, as so excessive.

Judgment is therefore affirmed.

of defense. Moreover, the point made by the appellant was elaborately embodied in its own instructions, and received in them, so that the jury had the full benefit of this legal feature of the case. All the instructions must be considered together, and when so considered in this case they manifestly constitute a complete statement of the law especially as applicable to the defense made by appellant. It is also to be noted that the instructions concerning proximate damages in evidence here do not contains the suggestion of a right of recovery for future consequences from a plaintiff's injuries, and it is stated that there is no evidence to support this feature in the instructions. This contention of appellant, however, cannot be sustained, because there is evidence of consequences following appellee's injury, of weakness of sight of the eye that was injured, and of continued trouble with the left wrist which follows the injury; also of intermittent headaches, which appellee sustains to matter from after the injury.

In view of this evidence the instructions was properly given. We do not review the amount of damages as fixed by the verdict, and for which judgment is entered, same is excessive.

Judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this ninth day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

208 I.A. 504

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

R H Dun Nov 12/17

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6439. Ag. No. 61.

Alma Schlatter,
appellee,
-vs-
Albert Triebel, Admr. of
Estate of Henry G. Triebel,
deceased,
Appellant.

208 I.A. 504

Appeal from Peoria.

Barnes, P. J.

This on its merits, as disclosed by the evidence, is a suit in assumpsit by appellee, Alma Schlatter, against her cousin, Albert Triebel, the appellant, for $[illegible]. which she claims he promised to pay her as a part consideration for the purchase by him of her father of the Ideal Laundry assets and business. She had judgment on a verdict for the full amount and the defendant prosecutes this appeal.

The evidence shows without contradiction that John Schlatter, father of appellee, had for some years been the owner operating the Ideal Laundry at Peoria, Illinois. Henry G. Triebel, his brother-in-law, had advanced him money and become security for him in amounts aggregating about $15,600. Triebel died February 10,1913, and his son, the appellant, was appointed administrator of his estate and John Schlatter gave the estate his promissory note of about $15,600. Appellee had been engaged in the laundry for some time as bookkeeper at a stated salary, which she received, and had from time to time advanced money to her father, or as the parties term it, to the Ideal Laundry. She continued in the business. In July, 1913, one Knauss, a public accountant, was employed to examine

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and report to appellant the condition of the laundry's assets, which he did, showing, among other things, that the bookkeeping was not in accordance with business usages and for that reason it was difficult to ascertain the exact condition. In the latter part of 1914 John W. Glascoe, a public accountant, was called in to arrange the books and ascertain the financial condition of the business. A great number of creditors were shown by the accounts and it appeared that the indebtedness was $22,745.02. This sum included the amount due the estate of Henry G. Triebel but did not include any indebtedness due to appellee. Negotiations were opened for the purchase of the assets by appellant in consideration of his paying the creditors, including the estate, sixty per cent. of their claims, which was figured at $13,600., and John Schlatter addressed a letter to each of the creditors stating that he was offered $15,600. for the business, which would enable him to pay them sixty cents on the dollar, and if that proposition was not accepted he would be forced into bankruptcy. The creditors accepted. A bill of sale of the property from John Schlatter to Albert Triebel, administrator of the estate of Henry G. Triebel, was executed and delivered, the note to the estate canceled, and money furnished by Triebel to pay the other creditors. During the negotiations which ended in appellant's purchase it had been discussed and arranged that appellee should continue in the business as long as she wished at the same salary she had theretofore received, and she did continue and draw her salary until March 25, 1916, when appellant discharged her paying her salary, however, for two weeks after that date.

Appellee claims that during the negotiations with appellant the indebtedness of the Ideal Laundry to her was repeatedly discussed and that the amount appeared on a ledger along with

the amount owing the Triebel estate, and that appellant told her they would not include the indebtedness to her in the settlement with creditors; that he would pay her in full after he had everything straightened up, meaning after he got into the business and got it running. She and her father each testify to an agreement by appellant to that effect in the presence of Mr. Boggess, appellant's attorney, and Mr. George B. Foster, appellee's father's attorney at the time the matter of the transfer of the business was finally arranged. It seems that Mr. Foster was dead and Mr. Boggess was the attorney representing appellant on the trial. Appellee and her father each insisted while testifying that the arrangement was as above stated, and in examination by Mr. Boggess said to him that he knew it. Appellant testifies that there was no such promise, but admits the presence of the two lawyers when the trade was made. He claims no such account was shown on the books, and called the expert accountant, Glascoe, who testified that he saw no such account and didn't learn in his examination of the affairs of any such indebtedness, The expert, Knouse, was not called by either party.

After her discharge appellee made demand in writing on appellant for $2500., the amount she claimed he owed her, and followed that demand with this suit making appellant, Albert Triebel, and her father, John Schlatter, defendants. The summons was returned served on Triebel. Schallater was not found and never appeared as a defendant. She filed a declaration of six counts, the third of which alleged, in substance, that the defendant, John Schlatter, doing business

as Ideal Laundry, was indebted to the plaintiff in the sum of $2500., for money loaned and advanced by the plaintiff to him and that he sold to defendant, Triebel, administrator, the business and assets of the laundry, and as a part of the consideration Triebel, administrator, agreed to pay all the indebtedness of Schlatter then outstanding including the amount so due the plaintiff. The other five counts included one charging violation of the Bulk Sales law,-which was during the trial dismissed,- the consolidated common counts, and other counts for moneys advanced by the plaintiff to the defendants. She filed an affidavit of claim with her declaration stating that her demand was for money loaned to the defendants and interest thereon, and that there is now due the plaintiff from the defendants the sum of $2500. Triebel filed the general issue to the whole declaration, and a plea to the third count denying that as part of the consideration of the sale of the laundry he agreed to assume and pay all indebtedness of John Schlatter, and denying that he promised to pay the plaintiff any sum of money, and filed with his pleas an affidavit of defence stating that the estate of Henry O. Triebel has never nor has he individually borrowed money from plaintiff, and that said estate is not now and never has been indebted, and that he individually has never been and is not now, indebted to the plaintiff as alleged.

The issue so formed on the third count was the only one tried. On motion of the defendant the court ordered the plaintiff to file a bill of particulars, which she did

consisting of eight items each reading " Cash loaned and advanced to Ideal Laundry" at eight different specified dates from January 20, 1912, to June 20, 1914, inclusive, aggregating $1941.26. Afterwards, by leave of court, she filed an amendment as follows:"Boundry cash items loaned and advanced to Ideal Laundry between January,1, and June 20, 1914, $250.74", making a total of $2200. At the close of plaintiff's evidence defendant Triebel moved the court for a directed verdict on three grounds: First,"That the pleadings and proof show a misjoinder of the defendants"; Second, "That the evidence shows a promise if any, and contract and dealings had with defendant as administrator of the estate of Henry G. Triebel, deceased, on behalf of the estate"; Third, "Because of variance between the pleadings and proof- the pleadings showing a joint liability and the proof an individual one." The court denied the motion and thereupon the the plaintiff dismissed her suit as to the defendant, John Hohlstter.

At the close of all the evidence the motion was renewed on the same grounds and denied, and the plaintiff dismissed as to the fourth (Bulk Sales) count. The jury returned a verdict for the plaintiff for $2200. The court November 24, 1916, took under advisement the defendant's motion for a new trial and on December 22 the record proper shows that he denied the motion and entered judgment on the verdict against Albert Triebel, administrator of the estate of Henry G. Triebel, deceased, doing business as the Ideal Laundry, to be paid de bonis propriis. The bill of exceptions shows that on the court's overruling the motion for a new trial the defendant moved that the judgment be made payable in

due course of administration, and the plaintiff moved that it be made payable de bonis propriis, and stated as one reason for her motion that the defendant since the verdict of the jury had appeared before the probate court of Peoria county and obtained an order discharging him as administrator and declaring said estate closed, and presented with her motion a copy of said probate court order.

During the entire transaction appellant supposed he was acting as administrator and probably used the funds of the estate in purchasing the business. Appellee and her father also regarded him as acting in that capacity. The testimony of both plaintiff and defendant was given and received on the theory that the transactions were with and the suit was against the administrator as such. The court so understood it and made remarks during the trial in the presence of the jury to that effect. It is now conceded that he had no authority to make that purchase in his representative capacity and was not liable as administrator; that the purchase of the laundry must be treated as his individual business, and if there is any liability it is against him personally and not as a representative of the estate, and that the description in the title admr. etc., must be treated as descriptio personae.

Appellant urges that he was prejudiced in the conduct of the trial by the assumption that the suit was against him as administrator instead of as an individual; that the jury supposed they were rendering a verdict against him as such administrator and that we cannot now know how they might have been affected by knowledge of the legal status of the claim.

presented under the other counts and not tried his replica one. The evidence fairly shows that she had advanced to her father at different times in different amounts in the aggregate $2300., and if the testimony of herself and her father are to be believed appellant agreed to pay her whatever the laundry owed her, and understood that was the amount. Appellant says there was no consideration for the promise but if he made it as claimed at the time of the transaction the property vested in him by the bill of sale afforded a valuable consideration. It is urged that the promise testified to by appellee and her father was to pay her as soon as appellant got things straightened around and in running order, and that the evidence does not show what the condition of the Ideal Laundry was at the time of the trial; that appellant may not yet have gotten matters straightened out and in running order. The promise was to pay in the future on the happening of a certain event. Appellee testifies that the substance of the agreement was that he would pay when he got possession and control of the business. The record shows that he had possession and control of the business for more than two years before suit was brought. Appellant grounds his defense entirely on the proposition that he never made any such promise. He made no claim and there is nothing in the evidence to indicate that the business was not straightened out and in running order when the suit was brought, and we think there is enough in the record to justify a finding that the condition specified existed for a time before the beginning of the suit.

By plaintiff's first instruction the jury were told,

But the record shows from beginning to end of the trial that Appellant was quite as responsible as appellee in misleading the jury in that respect. He is not now in a position to complain of that error. The question tried was whether he in the presence of his lawyer and John Schlatter's lawyer made appellee certain promises. The jury had the direct testimony of two witnesses that he did, and of one witness that he did not, with certain facts and circumstances corroborating each side submitted for their consideration in determining that question. In weighing the evidence it was not material whether he was making a contract as an individual or as a representative of the estate. Appellant also urges that the declaration charged a joint liability and the evidence does not tend to show such liability but only tends to show a several liability; therefore, that there was a variance between the pleadings and the proof. And appellee answers that under section 54 of our Practice act (J & A 6591) appellant not having filed a denial of joint liability cannot be heard to say that the obligation, if any, was several. An examination of the Illinois cases will show that notwithstanding the statute there cannot be a recovery under an allegation of joint liability when the evidence, taken together, shows that the liability was several. (United Workmen v Muhlke, 129 Ill.293; Powell Co. v Finn, 193 Ill. 367; Garrels v Meyer, 81 Ill. App. 306; Columbian Hard Wood Lumber Co., v. Langley, 51 Ill.App. 100.) But that question does not arise on this record. There was no effort here to enforce a joint liability. The case was dismissed as to defendant, Schlatter, at the close of the plaintiff's evidence.

The question is whether it was necessary to amend the declaration in that respect. The third count charged an individual liability of appellant. Issue was taken on that charge and the entire evidence directed to the question whether appellant made the promise there alleged. It is true that count also charged a joint promise of the defendants to pay the debt; but we think that may be rejected as surplusage. It was not material who besides the appellant agreed to pay her if he severally so undertook and agreed. The whole contest was directed to whether he did or did not so agree. There was no evidence showing or tending to show a joint undertaking. The third count clearly set out the several undertaking of appellant and recited a consideration therefor. To think she could recover on that allegation notwithstanding the fact that she unnecessarily further charged and failed to prove, that both defendants promised to pay her. If the pleadings presented only the issue whether a joint promise was made and broken, a different question would arise that we need not here discuss.

It is also objected that appellee did not prove her bill of particulars and it is true that there was no evidence showing or tending to show that the two defendants jointly owed her any amount, or that she had advanced to the Ideal Laundry the several items mentioned in her bill of particulars in the exact amounts there named or at the precise dates there specified. But the issue tried under the third count required no bill of particulars. Those

in substance, if they believed from the evidence that the defendant purchased the laundry business from John Schlatter and thereupon promised and agreed to pay the plaintiff said sum of money, they would find the issues joined for the plaintiff. This instruction is urged as error because it ignored the question of consideration. It is suggested by appellant that he might have bought the business and then afterwards made the promise, and in that case the transfer of the business would not furnish a consideration. This is true, but there was no issue of that kind tried. If appellant made the promise he made it as a part of the transaction in which he acquired the business, and that furnished the consideration. If, as he claims, he made no such promise, there was no question of consideration; therefore, as applied to the evidence, we see no error in that instruction. Plaintiff's third instruction told the jury that the preponderance of the evidence in the case is not alone determined by the number of witnesses testifying to a particular fact or state of facts, and stated various elements that the jury should consider in determining the preponderance of the evidence without including that of the number of witnesses. This instruction was error and has been so held by our supreme and appellant courts. It has rarely been held of itself reversible error, but might be in a case where the other party had much the greater number of witnesses on a material issue. On the main issue in this case- whether the promise was made- the appellee had two witnesses to appellant's one. It is true that on the collateral question whether her account against her father appeared in a book

kept at the laundry appellee testified that it was so kept, and appellant and the expert accountant, Gilmore, testified that they found no such account in any book, but there was evidence tending to show that such a book was kept and went into the possession of the appellant and was not produced on the trial although he was asked to produce it. We think the instruction tended rather to prejudice the plaintiff than the defendant and for that reason should not be held reversible error.

Appellant introduced a letter that he wrote his uncle at Stillwater, Minnesota, December 30, 1914, while negotiations for purchase were pending in answer to an inquiry about the condition of the Schlatter family, which letter he says he showed to appellee at the time it was written. He there says that he thinks the settlement will go through; that John Schlatter's family is left without funds and without future prospects except the ability of the children and the chance that John has to find employment; that he wants her to remain in the office if she can care for the books, "and should we come out all right she will certainly be rewarded for her help in bringing the business to a successful basis therefore the family will profit as we do.... if she elects to go out all interest in the business that the Schlatter family have will go out with her." He testifies that she made no objection to the statements in that letter. The uncle had no interest in the affair except a personal interest in the family. Appellant undertakes to in his testimony to explain what he meant by regarding her, and

says she did not fulfill her part of the agreement to stay in the business. The letter is not very inconsistent with her testimony to the effect that he did make the promise/and that it was an arrangement not to be published. Appellant was a business man probably regarded as very superior by her. It might well be that she would not contradict him or criticise his statement to their uncle that she was to be rewarded in some way that was not literally according to the facts. He also introduced a letter written by appellee to him April 7, 1916, about three months after the business was taken over in which she asks him for a loan of $500. for the purpose, among other things, of enabling her to keep up her father's life insurance. She assures him that the loan will be repaid, and states the desperate condition of the family and her inability to take care of them, and says she knows a feeling exists that she does not earn her wages in the laundry and with his permission she will resign if he makes the loan. She says nothing in that letter about any indebtedness from him to her. She explains this by saying that the letter was written to him personally and she supposed the agreement to pay the old indebtedness of her father to her was not by him personally but by the estate. This is quite likely true.

It is a situation that particularly requires a view of the witnesses and a listening to their spoken words to aid in a proper conclusion. The jury and trial judge had that advantage. Much weight should be given to their finding on the facts. We see no reason for reversing the judgment as against the weight of the evidence. Finding no reversible error the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 521

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6446. Ag. No. 33.

208 I.A. 521

Katheryn M. Cameron, Appellee,

-vs-

Thomas F. Feely, Appellant.

Appeal from Will.

Barnes, J. J.

Appellee, Katheryn M. Cameron, November 3, 1912, was severely injured by falling over a basket of ashes in the furnace room of a flat building in Joliet, one apartment of which she had occupied for about two years under a verbal lease from Thomas F. Feely, the appellant, to her husband. She brought this suit to recover for that injury claiming that the basket was in a place where appellant should expect her, as a tenant of the building, to be, and that appellant, as landlord, through his agent, the janitor, violated his duty to her, and was guilty of actionable negligence in leaving it there; that she had no reason to anticipate it, and there was a condition of semi-darkness; therefore she was in the exercise of due care when she stumbled upon it. A jury trial resulted in a verdict for the plaintiff of $2500. The court overruled defendant's motion for a new trial and entered judgment on the verdict, from which this appeal is prosecuted.

Various errors are assigned, but the main contention is that the evidence does not support the verdict, and that assuming the truth of the evidence most favorable to appellee she was injured while in a portion of the premises not included in the lease to her husband, and was a trespasser, or at least

Gen. No. 9440.

Ig. Ex. No.

208 I.A. 521

Kathryn V. Gaines,

-vs-

Appellee,

Appeal from Cir.

Thomas J. Healy,

Appellant.

Gross, P. J.

Appellee, Kathryn M. Gaines, October 6, 1921, was severely injured by falling over a bucket of water in the hallway room of a flat building in Joliet, one apartment of which she had occupied for about two years prior - which lease from Thomas J. Healy, the appellant, to her husband. She brought this suit to recover for that injury claiming that the hallway was in a place where reasonable minds agreed her, or a tenant of the building, to be, and that it was likely to be, unsafe through his agent. The jurors, violated the duty to her, and was guilty of actionable negligence in leaving it there; that she had no reason to anticipate it, and there was a condition of contributory; therefore she was in the exercise of due care when she stumbled upon it. A jury trial resulted in a verdict for the plaintiff of $3000. The court overruled defendant's motion for a new trial and entered judgment on the verdict, from which this appeal is prosecuted.

Various errors are assigned, but the main contention is that the evidence does not sustain the verdict, and that assuming the truth of the evidence most favorable to appellee she was injured while in a portion of the premises not included in the lease to her husband, and was a trespasser, or at least

a mere licensee; that there can be no recovery and the judgment should be reversed without remanding the cause.

It was a two-story building fronting south, divided into four apartments, two on each floor. Appellee with her husband was occupying the east apartment on the first floor under an oral lease from appellant to her husband, which included not only that apartment but a storeroom in the basement and right to use laundry tubs there. The basement was divided by a north and south partition into two main rooms, the laundry about [illegible] x [illegible] feet at the east, and furnace room about [illegible] x [illegible] feet at the west. It was entered through a door at the rear of the building or north of the building opening into the laundry room. Four or five storerooms opened out of the furnace room to the south and west. The one included in the lease was at the southeast corner of the furnace room and was naturally reached by entering the outside door of the basement, passing south in the laundry room a few feet, then west through the door into the furnace room, then south to the door of the storeroom. The laundry tubs, the use of which was included in the lease, were at the north end of the laundry room reached by turning east from the outside door of the basement. The furnace was several feet north of the door from the laundry to the furnace room, and about four feet from the partition. There was a post about eighteen inches northwest of the furnace, and a water faucet about two feet north of the furnace. There was no occasion for appellee to go north of the furnace, or within several feet south of it in the use and occupancy of her apartment and storeroom, and she would not go into the furnace room in her use of the laundry tubs. She testified sometime after she moved into the premises she was

inquiring about a place to throw waste papers and was told by the janitor that she could throw them on the rubbish pile, which was some distance northeast of the furnace, and that afterwards, about three weeks before the accident, she had been getting water from the laundry tub to water some plants in her storeroom and it was inconvenient to use that faucet because of its closeness to the wall, and she complained to the janitor and he asked her why she didn't get the water from the other faucet, and showed her the one back of the furnace, which she never before knew of, and said she could get water there for her plants, and she afterwards used that faucet for that purpose. At the time of the accident she had been to that faucet to get water and was returning to her storeroom when she fell over a metal bushel basket filled with ashes. She said it stood a little over a foot from the furnace and that there was no post there that she noticed. Other witnesses differed saying that it was setting inside the post in front of the furnace,- that it was close against the post,- west of the post,- right up against it.

Appellee's husband and appellant each in testifying stated the substance of the contract of leasing and did not differ. Appellant did not live in the building but attended to the business part of its management, making leases and collecting the rents. Appellee's only claim of right to go in that part of the basement where she was injured rests on what the janitor told her about disposing of her waste paper, and getting water from that faucet for her plants. Her counsel argue that there was a sort of general use of the basement by all of the tenants of the building; there does not seem

to have been any general use of that faucet. It was put there for the purpose of wetting down coal. Appellee did not know of its existence until the janitor told her. She was using it at the time in question as a mere licensee as she might have used a water faucet in any other apartment of the building that its occupant, or if unoccupied the janitor, might have given her permission to use for her own convenience. If there is any significance to her having gone into the northeast part of the furnace room to throw her waste papers on the rubbish pile we see nothing in the evidence to connect that privilege with any rights acquired under her husband's lease. It is nothing that might not have been permitted by a good-natured janitor of an adjoining building if it had been convenient for her to throw waste paper there. Appellee urges that the janitor had broader duties than those aridiarily ordinarily presumed from such a position, and recites that he had worked for appellant eight years and in that building from the time it was built; did all the janitor work; looked after the place when appellant was not there; when a new tenant came down to see the basement he showed them around if they asked him to ; that he showed the Camerons around the basement when they came; that when appellee had occasion to ask for anything to be done she asked the janitor; that he showed her the laundry and its conveniences, and showed her their locker, and light, and their meter; that he made minor repairs on the building or sent for a man to do it, and was in charge of the building and took care of the furnace and ashes, and basement, repaired faucets, electric lights, cleaned halls, porches, basement and sidewalks;

received requests from tenants and acted on them; all of which only means that he was the janitor of the building with such duties as are ordinarily imposed on one in such a building but with no power or authority to bind the owner by any contract for an interest in the premises. It may be admitted that his position gave him the right to grant privileges by way of license to the tenants to temporarily use the owner's property. Perhaps he might have permitted a tenant to enter and temporarily occupy some part of the premises not included in that tenant's lease and the tenant would not be a trespasser in acting on that license, but had he, without the owner's knowledge, permitted some tenant to occupy a vacant room it would have seemed quite clear that it was a mere permissive use and the owner would not be liable for defects in the room resulting in the occupant's injury.

We think it clear that appellee had no right under the lease to be in that part of the building where she was injured; that appellant owed her while there no duty except not to wilfully or wantonly injure her; that it was a mere permissive use that she was making of that part of the premises. The court held in Cunningham v. T.St.L.& K.C.R.R.Co., 260 Ill. 590, 595- " A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident", citing so many authorities that we need not prolong this opinion by a discussion of the numerous cases so holding.

We are of the opinion that there is no evidence sustaining the verdict. The judgment is therefore reversal without remanding the cause.

Reversed.

Finding of Facts; We find that the defendant below was not guilty of any negligence charged in the declaration causing the injury complained of.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 522

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

H Dru Nov 22/17

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6450.

Ellen O'Rourke, appellee

208 I.A. 522

vs

Appeal from Woodford.

City of Minonk, appellant.

Carnes, P. J.

Ellen O'Rourke, the appellee, a woman sixty six years of age, in fair physical condition, fell on a sidewalk in the city of Minonk in February 1915, fracturing her hip, wrist and one rib. The injury is permanent. She is now unable to walk and uses a wheel chair. This action was brought to recover for that injury, and a third jury trial resulted in a judgment on a verdict of $4000 for the plaintiff, from which this appeal is taken and a reversal asked because it is claimed the verdict is against the weight of the evidence, the court erred in instructions to the jury, and the conduct and language of appellee's attorney in examining witnesses and in his address to the jury was improper and prejudicial to the defendant.

The accident happened on a sidewalk about four feet wide made of brick six or eight inches square and two inches thick. Three months or more before the injury an abutting property owner dug a ditch about a foot wide from his premises through and under the sidewalk to the street to connect with the water main, and then filled the ditch with dirt to a slightly higher level than the surface of the walk. The brick were not replaced. The dirt settled and cinders were put in the depression. There was at and before the time in question still a depression at that point. Whether it was a slight depression of about half an inch, as testified by appellant's witnesses, or an uneven one from three to five inches below the surface of the walk, as testified by appellee's witnesses, was sharply contested leaving a fair question for the jury with the evi-

Gen. No. 6430.

Ellen O'Rourke, appellee

vs

City of Minonk, appellant.

208 I.A. 522

Appeal from Woodford.

Barnes, P. J.

Ellen O'Rourke, the appellee, a woman sixty six years of age, in fair physical condition, fell on a sidewalk in the city of Minonk in February 1911, fracturing her hip, wrist and one rib. The injury is permanent. She is now unable to walk and uses a wheel chair. This action was brought to recover for that injury, and a third jury trial resulted in a judgment on a verdict of $4000 for the plaintiff, from which this appeal is taken and a reversal asked because it is claimed the verdict is against the weight of the evidence, the court erred in instructions to the jury, and the damages and language of appellee's attorney in summing argument are in the address to the jury was improper and prejudicial to the defendant.

The accident happened on a sidewalk about four feet wide made of brick six or eight inches square and two inches thick. Three months or more before the injury an adjoining property owner dug a ditch about a foot wide from his premises through and under the sidewalk to the street to connect with the water main, and then filled the ditch with dirt to a slightly higher level than the surface of the walk. The bricks were not replaced. The first artificial and similar work put in the depression. There was at one period the tree in question still a depression at that point. Whether it was a slight depression of about half an inch, as testified by appellant's witnesses, or as uneven one from three to five inches below the surface of the walk, as testified by appellee's witnesses, was strongly contested leaving a fact question for the jury with the evi-

dence so nearly balanced that their verdict should control. It was raining at the time of the accident - the walks were slippery and covered with snow and water. Appellee testified that she stepped in this hole filled with water and fell. She was corroborated by her daughter who was then walking a few feet ahead of her. Appellant offered evidence tending to show that she fell on the walk several feet from the depression. The court instructed the jury that she could not recover unless the evidence affirmatively showed that she fell at the place she claimed. This was also a fair question for the jury, with the preponderance of the evidence in favor of the plaintiff.

The court instructed the jury at the instance of the plaintiff that she was entitled to recover damages if she had established by a greater weight of evidence:-

" (1) That she was in the exercise of due care for her own personal safety at the time of and just prior to the time she received the injuries in question.

(2) That the city of Minonk was guilty of a specific negligence charged in the declaration, or in some count thereof;

(3) That the defect in the sidewalk in question existed as charged in the declaration and had existed for such a length of time before the accident that the City of Minonk knew of its existence or by the exercise of reasonable care, through its officers, could have discovered the defect in time to have repaired it prior to the time of the injury to the plaintiff;

(4) That the negligence charged in the declaration was the direct cause of the injury;

(5) That within six months after said injuries the plaintiff caused to be served u on the city attorney and the city clerk of Minonk, a notice of which Exhibit B introduced in evidence is a copy;

And that she has proved by the greater weight of the evidence

Hence so nearly balanced that their verdict should control. It was raining at the time of the accident - the walks were slippery and covered with snow and water. Appellee testified that she stepped in this hole filled with water and fell. She was corroborated by her daughter who was then walking a few feet ahead of her. Appellant offered evidence tending to show that she fell on the walk several feet from the depression. The court instructed the jury that she could not recover unless the evidence affirmatively showed that she fell at the place she claimed. This was also a fair question for the jury, with the preponderance of the evidence in favor of the plaintiff.

The court instructed the jury at the instance of the plaintiff that she was entitled to recover damages if she had established by a greater weight of evidence:-

" (1) That she was in the exercise of due care for her own personal safety at the time of and just prior to the time she received the injuries in question.

(2) That the city of Minonk was guilty of a specific negligence charged in the declaration, or in some count thereof;

(3) That the defect in the sidewalk in question stated as charged in the declaration had existed for such a length of time before the accident that the City of Minonk knew of its existence or by the exercise of reasonable care, through its officers, could have discovered the defect in time to have repaired it prior to the time of the injury to the plaintiff;

(4) That the negligence charged in the declaration was the direct cause of the injury;

(5) That within six months after said injuries the plaintiff caused to be served a on the city attorney and the city clerk of Minonk, a notice of which Exhibit E introduced in evidence is a copy;

And that she has proved by the greater weight of the evidence

the items stated in said notice."

And at the instance of the defendant that they could not find a verdict for the plaintiff unless she had proved each and all of the following things:-

" First. That the defendant was guilty of lack of ordinary care in the constructionor maintenance of the sidewalk in question, and that such lack of care was the proximate cause of the injury complained of;

Second. That the plaintiff herself was not guilty of such lack of ordinary care and prudence for her personal safety as materially contributed to the injury complained of;

Third: That the sidewalk in question was in such condition that persons exercising ordinary care for their personal safety would not pass thereover safely; that the defendant knew of such condition long enough before the happening of the injury complained of, or that such condition had existed long enough for the defendant in the exercise of ordinary care to have learned thereof and repaired the same before said injury;

Fourth: That the plaintiff fell and received her injuries at the place alleged in her declaration herein, and not at the place where Kohl's cement sidewalk joins the brick sidewalk in question."

Appellant claims that item (1) of plaintiff's instruction is not broad enough in requiring care "just prior" to the time she received the injury; that it withdrew from the jury the question whether she was negligent in going upon the sidewalk at all; and that proof of the slippery condition of the walk raised that issue. Again, that item (3) assumed a defect in the sidewalk in using the words "the defect" which objection, we presume, might have been obviated by using the words "a defect". It is said the instruction assumes that plaintiff received the injury at the place where the bricks

the items stated in said motion."

And at the instance of the defendant that they could not find a verdict for the plaintiff unless she had proven each and all of the following things:-

" First. That the defendant was guilty of lack of ordinary care in the construction or maintenance of the sidewalk in question, and that such lack of care was the proximate cause of the injury complained of;

Second. That the plaintiff herself was not guilty of such lack of ordinary care and prudence for her personal safety as materially contributed to the injury complained of;

Third: That the sidewalk in question was in such condition that persons exercising ordinary care for their personal safety would not pass thereover safely; that the defendant knew of such condition long enough before the happening of the injury complained of, or that such condition had existed long enough for the defendant in the exercise of ordinary care to have learned thereof and repaired the same before said injury;

Fourth: That the plaintiff did not contribute to her injuries at the place alleged in her declaration herein, and not at the place where Kohl's cement sidewalk joins the brick sidewalk in question."

A defendant claims that item (1) of plaintiff's instruction is not broad enough in requiring care "just prior" to the time she received the injury; that it withdrew from the jury the question whether she was negligent in going upon the sidewalk at all; and that proof of the slippery condition of the walk raised that issue. Again, that item (3) assumed a defect in the sidewalk in using the words "the defect" which objection, we presume, might have been obviated by using the words "a defect". It is said the instruction assumes that plaintiff received the injury at the place where the bricks

were removed. It is not pointed out and we do not discover where that assumption is found in the instruction. It is also said that it was error to refer the jury to Exhibit B, which is a copy of the notice of the accident served on the city, because the papers were introduced merely for the purpose of showing notice and not as evidence of the facts therein stated. By the instruction the jury were required to find all the controverted facts essential to a verdict before reference to Exhibit B. It appears from the record that Exhibit B stated the plaintiff's place of residence; that she had sustained injuries to her person by reason of a defect in the sidewalk (locating the place) between the hours of eight and nine o'clock P. M. on the night of February 1, 1915, and gave the name of the doctor attending her, the location of his office, and his address. While it is true that this exhibit was not evidence of the facts therein stated and the jury were repeatedly so advised in other instructions, the defendant was not harmed by requiring the plaintiff to prove those facts. We fail to see any prejudicial error in that instruction. The words "just prior" are much discussed in the briefs. If they restricted the inquiry, as appellant now claims it is hardly in position to here complain. In its offered and given instructions numbered 22 and 49 the words "immediately prior" and "just prior" were used in advising the jury when and for how long the law required care on the part of the plaintiff. The court gave nine other instructions for the plaintiff, all of which were substantially covered by the one just recited and most of which are criticised by appellant on similar grounds. We do not find prejudicial error in any of them. The court read for the defendant thirty eight instructions, as offered, and thirteen more slightly modified. Any danger that the jury might misunderstand some feature of the case favorable to the

were removed. It is not pointed out and we do not discover where that assumption is found in the instruction. It is also said that it was error to refer now the jury to Exhibit E, which is a copy of the notice of the accident served on the city, because the parties were instructed merely for the purpose of showing notice and not as evidence of the facts therein stated. By the instruction the jury were required to find all the controverted facts essential to a verdict before reference to Exhibit E. It appears from the record that Exhibit E states the plaintiff's place of residence; that she had sustained injuries to her person by reason of a defect in the sidewalk (locating the place) between the hours of eight and nine o'clock P. M. on the night of February 1, 1912, and gave the name of the doctor attending her, the inventor of the article, and a witness. While it is true that this exhibit was not evidence of the facts therein stated, and the jury were repeatedly so advised in other instructions, the defendant was not harmed by requiring the plaintiff to prove those facts. We fail to see any prejudicial error in that instruction. The words "just prior" are well understood in the bilate. If they restricted the inquiry, as appellant now claims it is hardly in position to have complain. In its efforts and given instructions numbered 23 and 24 the words "immediately prior" and "just prior" were used in advising the jury when and for the use and the law required here on the part of the plaintiff. The court gave nine other instructions for plaintiff, all of which were substantially covered by the one just recited, all but of which appellant now are criticized in a manner as similar grounds. We do not find prejudicial error in any of them. The court was for the defendant thirty eight instructions, as offered, and thirteen more slightly modified. Any danger that the jury might misunderstand some feature of the case favorable to the

defendant was removed by those instructions, which, with great ingenuity, reiterated appellant's theory of what it was necessary for the plaintiff to prove to entitle her to a verdict, and of the relative rights and duties of the parties, and repeatedly told the jury that the defendant was only bound to keep its walks reasonably safe for public travel by persons using ordinary care, and that it was not liable for a mere accident, and was not required to foresee and provide against possible dangers, and said again and again that plaintiff could not recover if she received her injuries at someplace other than at the depression as charged in the declaration no matter whether a few or several feet from the place, and that the plaintiff must prove that "at and immediately before the time she fell" she was exercising due care; that she could not recover if the injury complained of was contributed to by any failure on her part to exercise ordinary care for her own safety "at and just prior to the time of the accident in question;" and that she could not recover for an accident caused by mere slipperiness and unevenness alone caused by merely tramping, thawing and freezing; that she could not recover if the accident was attributable solely to the temporary slipperiness of the sidewalk and not to a dangerous depression in the walk itself. Several instructions tendered by the defendant were refused, but except insofar as they undertook to advise the jury as matter of law whether the sidewalk was safe they were covered by instructions given. It is not seriously contended, and there is no ground for contention that the plaintiff could be held negligent in choosing the sidewalk in question, though as in most such cases she could have taken another walk; neither is it claimed that she was familiar enough with the place so that she was sufficiently charged with notice of the particular defect to require her

defendant was removed by those instructions, which, with great ingenuity, reiterated appellant's theory of what it was necessary for the plaintiff to prove to entitle her to a verdict, and of the relative rights and duties of the parties, and respectfully told the jury that the defendant was only bound to keep its walks reasonably safe for public travel by persons using ordinary care, and that it was not liable for a mere accident, and was not required to foresee and provide against possible dangers, and said again and again that plaintiff could not recover if she received her injuries at someplace other than at the depression in the sidewalk no matter whether a few or several feet from the place, and that the plaintiff must prove that "at the immediately before the time she fell" she was exercising due care; that she could not recover if the injury complained of was contributed to by any failure on her part to exercise ordinary care for her own safety "at and just prior to the time of the accident in question;" and that she could not recover from accident caused by mere slipperiness and unevenness alone caused by merely tramping, thawing and freezing; that she could not recover if the accident was attributable wholly to the temporary slipperiness of the sidewalk and not to a dangerous depression in the walk itself. Several instructions tendered by the defendant were refused, but every instruction at their request to advise the jury as matter of law whether the sidewalk was safe they were refused by instructions given. It is not seriously contended, and there is no ground for contention that the plaintiff could be held negligent in walking the sidewalk in question, though on the most some there could have taken another walk; neither is it claimed that she was familiar enough with the place so that she was sufficiently charged with notice of the particular defect to require her

in the exercise of ordinary care to have kept it in mind. Appellant is largely responsible for the unnecessarily great number of instructions read to the jury. As must always be the case in such a record, sentences and phrases can be isolated and subjected to just criticism. That is true in this case of instructions given for each party. If prejudicial error occurred it was in repeating propositions favorable to the defendant until the instructions assumed the nature of an argument. Taken as a whole, the instructions were more favorable to the defendant than it had a right to ask.

Appellant urges that appellee's counsel made many statements in his argument to the jury that were improper and prejudicial to the defendant and presents the entire argument in the record here showing appellant's objections and the rulings of the court thereon. It is also said that appellee's brief and argument filed in this court is improper and on the authority of Zukas v Appelton Mf.g Co. 277 Ill. 87, should be stricken from the files. There is some ground for this attack on appellee's conduct of the case. In the brief and argument of her counsel here it is stated that three juries thirty six men - had found the issues for the plaintiff, coupled with the further statement of reasons why new trials were granted in the two former cases notwithstanding the record here furnishes no support for those assertions of fact except that it does appear from the examination of witnesses that some of them had testified on two former ~~xxxxxx~~ trials of the case. Such conduct by counsel is always condemned by the courts. The brief in some other respects slightly resembles that filed in Zukas v Appleton Maff. Co. supra, which was stricken from the files by the supreme court and an opinion written that was no doubt intended for profitable perusal by

in the exercise of ordinary care to have kept it in mind. Appellant is largely responsible for the unnecessarily great number of instructions read to the jury. As must always be the case in such a record, sentences and phrases can be isolated and subjected to just criticism. That is true in this case of instructions given for each party. If prejudicial error occurred it was in repeating propositions favorable to the defendant until the instructions assumed the nature of an argument. Taken as a whole, the instructions were more favorable to the defendant than it had a right to ask.

Appellant urges that appellee's counsel made many statements in his argument to the jury that were improper and prejudicial to the defendant and presents the entire argument in the record here showing appellant's objections and the rulings of the court thereon. It is also said that appellee's brief and argument filed in this court is improper and on the authority of Zukas v. Appleton Mfg. Co. 227 Ill. 87, should be stricken from the files. There is some ground for this attack on appellee's conduct of the case. In the brief and argument of her counsel here it is stated that these jurors thirty six men - had found the issues for the plaintiff, coupled with the further statement of reasons why new trials were granted in the two former cases contradicting the record here furnishes no support for these assertions of fact except that it does appear from the examination of witnesses that some of them had testified on the former examination trials of the case. Such conduct by counsel is always condemned by the courts. The point in some other respects slightly resembles that filed in Zukas v. Appleton Mfg. Co., supra, which was stricken from the files by the supreme court and an opinion written that was no doubt intended for profitable perusal by

attorneys who might find themselves inclined to a method of argument there condemned. If appellee's counsel had improperly stated prejudicial facts to the jury not supported by the evidence it would furnish a strong reason for reversing the case, but we do not find that he did so. He did at various times improperly comment on the evidence and the witnesses, but the court in all such cases not only sustained appellant's objection but also treated the matter with such force and decision as to fully impress the jury with the impropriety of counsel's conduct, thus creating a situation more likely to prejudice the jury against appellee's counsel than to bias them in favor of her case. Complaint is also made of the conduct of appellee's counsel in examining witnesses, which was in some respects wrong and was promptly checked by the court. We are of the opinion that defendant was not prejudiced by these errors of appellee's counsel.

Appellant at the close of the evidence moved for a directed verdict, which the court denied, and insists here that the depression which was shown to have existed in the walk at the place where the bricks had been removed would not in law, constitutea dangerous condition, nor such condition as to create a cause of action against the village because of an injury suffered at such place; that the city was not obliged to make its walks so smooth and so level that no one might fall thereon. Counsel cite and quote from City of Meridian v Crook, 69 So. Rept. 182 (Miss.) Waggener v Town of Point Pleasant, 42 W. Va. 798; Hamilton v City of Buffalo, 173 N. Y. 72; Betz v City of Yonkers, 148 N. Y. 67; and Butler v City Village of Oxford, 186 N. Y. 444, in each of which cases the court considered whether the defect shown in the sidewalk was sufficient to charge the municipality with negligence, and held that it was not. Whether a sidewalk is in a reasonably safe

attorneys who might find themselves inclined to a method of argument there condemned. If appellee's counsel had improperly stated prejudicial facts to the jury not supported by the evidence it would furnish a strong reason for reversing the case, but we do not find that he did so. He did at various times improperly comment on the evidence and the witnesses, but the court in all such cases not only sustained appellant's objection but also treated the matter with such force and decision as to fully impress the jury with the impropriety of counsel's conduct, thus creating a situation more likely to prejudice the jury against appellee's counsel than to bias them in favor of the ~~xxxx~~ her case. Complaint is also made of the conduct of appellee's counsel in examining witnesses, which was in some respects wrong and was promptly checked by the court. We are of the opinion that appellant was not prejudiced by these errors of appellee's counsel.

Appellant at the close of the evidence moved for a directed verdict, which the court denied, and insists here that the depression which was shown to have existed in the walk at the place where the plaintiff had been injured would not in law, constituted dangerous condition, for such condition is to create a cause of action against the village because of an injury suffered at such place; that the city was not obliged to make its walks so smooth and so level that no one might fall thereon. Counsel cite and quote from City of Danville v Crook, 89 Ill. Appt. 123 (Abst.) Wagner v Town of Point Pleasant, 43 W. Va. 798; Hamilton v City of Muncie, 174 N. Y. 71; Beta v City of Yonkers, 148 N. Y. 67; and Butler v Mayor of Large of Oxford, 138 N. Y. 414, in each of which cases the court considered whether the defect shown in the sidewalk was sufficient to charge the municipality with negligence, and held that it was not. Whether a sidewalk is in a reasonably safe

condition is a question of fact, like all other questions of fact, to be determined by the jury, unless the uncontradicted evidence is of such character that all reasonable minds might be presumed to reach the same conclusion from its consideration. If in the opinion of the court it is of that character he is required to treat the fact established and direct a verdict accordingly. If the proof showed without controversy in this case that the depression in the walk was only a half inch it would call for serious consideration of the question whether a jury could be permitted to find it a ground for the charge of appellant's negligence. In case of sidewalks not much traveled in residence portions of cities and villages we presume all fair-minded men would reach the conclusion that permitting a brick or a row of bricks to remain a half inch higher than the adjoining surface was not a violation of the rules requiring care on the part of the municipality in maintaining walks, but in the present case there was a trench extending the entire width of the sidewalk about a foot wide and from three to five inches deep filled with water. As we have before said, we think the jury were warranted in finding that evidence true, and if that was the condition, it can hardly be argued that the question presented was so clear as to permit its withdrawal from the consideration and determination of the jury.

The cases of Village of Clayton v Brooks, 150 Ill. 97; Village of Cullom v Justice, 161 Ill. 372; City of Aurora v Dale, 90 Ill. 46; and Quinn v City of Chicago, 199 Ill. App. 416, are cited by appellee in support of her contention that defects of the character here shown have been held to show negligence of municipalities. In some of the cases, particularly the last, the defect in question seems to have been slight, at least not more serious than the one here shown,

condition is a question of fact. Like all other questions of fact, to be determined by the jury, unless the uncontradicted evidence is of such character that all reasonable minds might be prevailed to reach the same conclusion from the consideration. If in the opinion of the court it is of that character he is required to treat the fact established and direct a verdict accordingly. If the proof showed without controversy in this case that the depression in the walk was only a half inch it would call for serious consideration of the question whether a jury could be permitted to find it a ground for the charge of a pedestrian's negligence. In case of sidewalks not much traveled in residence portions of cities and villages we presume all fair-minded men would reach the conclusion that permitting a brick or a row of bricks to remain a half inch higher than the adjoining surface was not a violation of the rules requiring care on the part of the municipality in maintaining walks, but in the present case there was a trench extending the entire width of the sidewalk about a foot wide and from three to five inches deep filled with water. As we have before said, we think the jury were warranted in finding that existence true, and if that was the condition, it can hardly be argued that the question presented was so clear as to permit its withdrawal from the consideration and determination of the jury.

The cases of Villars v Dwyer, 98 Ill. 67; Village of Carlton v Justice, 101 Ill. 272; City of Lanark v Dale, 90 Ill. 49; and Quinn v City of Chicago, 142 Ill. 349, 46, are cited by appellee in support of the contention that defects of the character here shown have been held to be mere negligence of municipalities. In some of the cases, particularly the last, the defect in question seems to have been slight, at least not more serious than the one here shown.

and in most of the cases it was assumed, apparently without contention, that permitting the defect to remain was negligence. We think it clear in the present case that it was at least a fair question for the jury whether appellant in the exercise of that care required of municipalities was negligent in permitting the walk to remain in the condition disclosed by the evidence, and that the finding involved in their verdict that it was, should not be disturbed.

We find no reversible error in the record; therefore the judgment is affirmed.

Affirmed.

and in most of the cases it has claimed, apparently without contention, that permitting the sidewalk to remain was negligence. We think it clear in the present case that it was at least a fair question for the jury whether appellant in the exercise of that care required of municipalities was negligent in permitting the walk to remain in the condition disclosed by the evidence, and that the finding involved in their verdict that it was, should not be disturbed.

We find no reversible error in the record; therefore the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 524

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6456.

208 I.A. 524

John Linn, appellee.

vs Appeal from Co. Ct. Peoria.

Lucy Moore, appellant.

Carnes P. J.

This is an appeal from a judgment for the plaintiff in a forcible entry and detainer suit tried before the court without a jury.

The land was located in Peoria and had been mortgaged by the owner, Robert Krieger, to secure the payment of a promissory note of one Jacobson and himself One Merriwether had a claim on the land growing out of a sale for delinquent taxes. Fannie Feinberg, the owner of the note, filed a bill in the circuit court of Peoria County to foreclose the mortgage making Krieger, Jacobson, Merriwether and Lucy Moore, the appellant herein, parties defendant. There was due service on all the defendants and default as to each, except Merriwether answered setting up the amount of his lien. The suit went to final decree in which there was no finding as to the interest of Lucy Moore except that it was subsequent and subject to the interest of the complainant. The rights of the other three parties were determined and sale and distribution ordered in the usual form employed in drafting such decrees of foreclosure. The land was purchased at the foreclosure sale by the complainant, Fannie Feinberg. On the last day of the fifteenth following months John Linn, the appellee, obtained a judgment against Kreiger, sued out an execution thereon, and paid the redemption money to the sheriff, who levied upon the premises and sold and conveyed them to appellee in the time and manner provided by law. Afterwards appellee caused a demand for immediate possession to be servedupon appellant, and on her

Gen. No. 5438.

John Linn, appellee.

va

Appeal from Co. Ct. Peoria.

Lucy Moore, appellant.

Curran P. J.

This is an appeal from a judgment for the plaintiff in a forcible entry and detainer suit tried before the court without a jury.

The land was located in Peoria and had been mortgaged by the owner, Robert Krieger, to secure the payment of a promissory note of one Jacobson and himself. One Kerlewether had a claim on the land growing out of a sale for delinquent taxes. Fannie Feinberg, the owner of the note, filed a bill in the circuit court of Peoria County to foreclose the mortgage naming Krieger, Jacobson, Kerlewether and Lucy Moore, the appellant herein, parties defendant. Duly was the service on all the defendants and default as to each, except Kerlewether answered setting up the amount of his lien. The suit went to final decree in which there was no finding as to the interest of Lucy Moore except that it was subsequent and subject to the interest of the complainant. The rights of the other three parties were determined and sale and distribution ordered to the usual form employed in dealing with matters of foreclosure. The land was purchased at the foreclosure sale by the complainant, Fannie Feinberg. On the last day of the fifteen following months John Linn, the appellee, exhibited a judgment against Krieger, and got an execution thereon, and with the proceeds and soil and conveyed them to appellee in the time and manner provided by law. Afterwards appellee brought suit for immediate possession to be overthrown proceedings, and on her

refusal, begun this suit. Plaintiffs testimony shows the above facts, and while appellant assigns error in its admission, she points out none, but simply says in her brief that sufficient grounds were not laid for the introduction of appellee's judgment and it was not shown to be a valid judgment and should have been excluded. We fail to see any defect in the record of that judgment. If there is one, it was appellant's duty to point it out.

Appellant, in defense, offered in evidence certified copy of a lease to the premises from Robert Krieger to John Linn August 4, 1916, the same day that Linn obtained his judgment and execution before mentioned; also record of a forcible entry and detainer suit begun before a justice of the peace by Robert Krieger against Lucy Moore June 32, 1915, on a complaint alleging, among other things, that she was indebted to him for rent, and the final termination of that suit on a peal in the county court August 4, 1916, in a judgment for the defendant. Appellant devotes a large part of her brief to an argument that said judgment bars appellee. She assumes that he is claiming under his deed from Krieger, and that the judgment bars Krieger and all parties claiming under him. The record does not disclose the ground of Krieger's claim for possession in that suit further than the intimation in the complaint that Lucy moore was his tenant and in default on payment of rent. Whether he was defeated because she was found not to be his tenant, or because she was found to be his tenant and not to be in default in payment of rent, or for some other reason that may readily be imagined, we cannot know. It cannot be claimed that a landlord defeated in a forcible detainer action grounded on default in payment of rent would be therefore forever after deprived of possession of his land. But a pellee here is not claiming under his deed from Krieger, but under

refused, began this suit. Plaintiff's testimony shows the above facts, and while appellant assigns error in its admission, she points out none, but simply says in her brief that sufficient grounds were not laid for the introduction of appellee's judgment nor it was not shown to be a valid judgment and should have been excluded. We fail to see any merit in the record of this judgment. If there is one, it was appellant's duty to point it out.

Appellant, in defense, offered in evidence certified copy of a deed to the premises from Robert Krieger to Jane Linn August 4, 1916, the same day that Linn obtained the judgment and execution before mentioned; also record of a foreible entry and detainer suit taken before a justice of the peace by Robert Krieger against Lucy Moore June 24, 1919, on a complaint alleging, among other things, that she was indebted to him for rent, and the final termination of that suit in a writ in the county court August 4, 1919, in a judgment for the defendant. Appellant devotes a large part of her brief to an argument that said judgment bars appellee. The lessee that he is claiming under his deed from Krieger, and that the judgment bars Krieger and all parties claiming under him. The record does not disclose the ground of Krieger's claim for possession in that suit further than the information in the complaint that Lucy Moore was his tenant and in default on payment of rent. Whether he was interested because she was found not to be his tenant, or because she was found to be his tenant and not in default in payment of rent, or for some other reason that may readily be imagined, is silent there. It seemed to claimed that a landlord related to a forcible detainer action founded on default in payment of rent would be interested forever after thereafter of possession of the land. But appellee here is not claiming under the deed from Krieger, but under

his deed from the sheriff. He did not prejudice his rights under that deed by procuring a conveyance from Krieger. (The People v Bowman, 181 Ill. 421; Heinroth v Frost, 250 Ill. 102.) Appellee had the right to redeem though he obtained his judgment on the last day of the fifteen months. (Phillips v DeMoss 14 Ill. 410.) Appellee's title under the sheriff's deed to him relates back to the decree from which redemption was made. (Smith v Mace, 137 Ill. 68; Keithley v Interstate Bank & Trust Co. 154 Ill. App. 443.)

No propositions of law were submitted to the trial court by either side. Competent and uncontradicted evidence supports the finding and judgment. The trial was before the court without a jury; therefore it was not material error if other evidence not technically competent was heard. We find no reversible error in the case; therefore the judgment is affirmed.

Affirmed.

his deed from the sheriff. He did not prejudice his rights under that deed by recurring a conveyance from Kibber. (The People v Hamman, 121 Ill. 422; Heinrich v Frost, 200 Ill. 1.) Appellee had the right to redeem though he obtained his judgment on the last day of the fifteen months. (Phillips v Dawes 14 Ill. 410.) Appellee's title under the sheriff's deed to him relates back to the decree from which redemption was made. (Smith v Race, 127 Ill. 32; Keithley v Interstate Nat. & Trust Co. 154 Ill. App. 412.)

No propositions of law were submitted to the trial court by either side. Competent and uncontradicted evidence supports the finding and judgment. The trial was before the court without a jury; therefore if was not material error if other evidence not technically competent was heard. In fact no reversible error in the case; therefore the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 525

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6460. Ag. No. 43.

Alfred M. Swengel, Administrator of the Estate of Anton Voitnar, alias Anton Savrage, Plaintiff in Error,

-vs-

Chicago, Ottawa & Peoria Railway Company (a Corporation) Defendant in Error.

208 I.A. 525

Error to LaSalle.

Carnes, P. J.

This is an action on the case brought by the plaintiff in error, Alfred M. Swengel, administrator, against defendant in error railway company to recover for the alleged wrongful death of Anton Voitnar. It was tried on a declaration of two counts charging negligence of the defendant in operating a train of cars on which the deceased was riding January 11, 1910, throwing him from the platform and mortally injuring him. Each count, as amended, alleged that the deceased left him surviving Ignatz Voitnar, his father, his heir-at-law. The defendant plead the general issue. Evidence was introduced tending to show that deceased was sixteen years and eleven months old at the time of his death January 11,1910; that his father was living in Russia and that Anton had sent him substantial sums of money from his earnings as a laborer, and that his death was caused by the negligence of the defendant, as charged. The character and habits of deceased were apparently such as to lead to the presumption that, had he lived, he could and would have rendered his father such aid as is ordinarily expected in case of people situated as they were. There was confusion in the testimony as to the heirs

of deceased, and whether his father was living, but the jury found the issues for the plaintiff and assessed the damages at $100.00. This amounted to a finding that defendant's negligence caused the death of Anton Voitner and that he left his father surviving as his heir, as charged in the declaration. The court denied the plaintiff's motion for a new trial and entered judgment on the verdict, from which judgment the plaintiff prosecutes this writ of error and asks a reversal on the grounds that the verdict and judgment is inadequate and that the court erred in ruling on instructions to the jury. No cross errors are assigned.

We think, under the evidence, it was within the province of the jury to find the controverted allegations of negligence and death and survivorship for the plaintiff. The case on the main question here presented must be considered as one of wrongful death of a boy seventeen years old leaving his father surviving with suchexpectation of pecuniary benefit from his son's continued life as might reasonably be entertained by a non-resident parent under similar circumstances. The verdict is nominal . If the issues tendered by the declaration were not proven, then the father had the legal right to his son's earning for four years and there should have been a substantial verdict for the plaintiff. For this reason the court erred in not granting plaintiff's motion for a new trial.

We find no material error in the instructions except defendant's given instruction number thirteen. One of plaintiff's witnesses testifying as to the survivorship of

deceased's father had testified before the coroner's jury, in substance, that the father was dead. The defendant introduced that testimony by way of impeachment and offered an instruction in the usual form applicable to consideration of impeaching evidence, but added if the jury believe any such statements were the truth they have a right to consider such statements in weighing the evidence. The witness was not a party. It is not claimed that his statements out of court were admissible except as impeaching testimony. It was therefore error to instruct the jury that he might regard such statements for any other purpose.

The judgment is reversed and the cause remanded.

Reversed and Remanded.

deceased's father had instilled before the current jury, in evidence, that the father was dead. The appellant introduced that testimony by way of independent and admissible evidence in the usual form applicable to impeachment by foreign evidence, but which if the jury believe any such statements were the truth they have a right to consider such statements in weighing the evidence. The attorney has not a party. It is not claimed that the statements and it also were admissible except as impeachment testimony. It was therefore error to instruct the jury that the alleged statements for any other purpose.

The judgment is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 550

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6419

James C. Hartley, appellant.

vs

B. H. Blauvelt, appellee.

208 I.A. 550

Appeal from Stark.

Dibell, J.

Hartley brought replevin against Blauvelt for four mules, and filed a proper declaration. Defendant pleaded non cepit, non detinet, that the mules were the property of the defendant, and that the mules were the property of Walter Cole. Issues were joined on these pleas and on replications to the special pleas. There was a jury trial. At the close of all the evidence the court directed a verdict for defendant, denied a motion by plaintiff for a new trial, and entered judgment in bar for defendant. Plaintiff appeals.

If there is evidence from which, if it stood alone, the jury could without acting unreasonably in the eye of the law, find that all the material averments of the declaration or some one count thereof, have been proven, the cause should be submitted to the jury to determine the disputed questions of fact. Libby, mCNeill & Libby v Cook, 222 Ill. 306; Devine v Delano, 272 Ill. 166; and cases there cited. Plaintiffs evidence was to the effect that an agent of his bxought mules for him in Nebraska, that he paid therefor, that they were shipped to him in Stark County, that he sold most of them at public sales and had four mules left, that there were certain deals in which he and Cole and another were concerned, that it was agreed between Cole and himself that Cole should pay him $50.00 and pay certain expenses incurred in Stark County and pay the fees of the agister with whom plaintiff had placed the mules, and that when these bills were settled Hartley was to turn over the four mules to Cole, xxx that shortly thereafter Cole met Hartley and said that he had forgotten

Gen. No. 8618

James C. Hartley, appellant.

vs

D. H. Flanagan, appellee.

Appeal from Park.

208 I.A. 550

Dibell, J.

Hartley brought replevin against Flanagan for four mules, and filed a proper indemnation. Defendant pleaded non cepit, non detinet, that the mules were the property of the defendant, and that the mules were the property of Walter Cole. Issues were joined on these pleas and on replications to the special pleas. There was a jury trial. At the close of all the evidence the court directed a verdict for defendant, denied a motion by plaintiff for a new trial, and entered judgment in bar for his costs. Plaintiff appeals.

If there is evidence from which, if it stood alone, the jury could without acting unreasonably in the eye of the law, find that all the material averments of the indemnation or some one count thereof, have been proven, the cause should be submitted to the jury to determine the disputed questions of fact. Libby, McNeill & Libby v Cook, 215 Ill. 608; Devine v Delano, 218 Ill. 166; and cases there cited. Plaintiffs evidence was to the effect that an agent of his brought mules for him in February, that he paid therefor, that they were shipped to him in Park County, that he sold most of them at public sales and had two mules left. That there were certain leads in which he had Cole and another were concerned, that it was agreed between Cole and himself that Cole should pay him $30.00 and pay certain expenses incurred in Park County and pay the fees of the sheriff when plaintiff had placed the mules, and that when these bills were settled Hartley was to turn over the four mules to Cole, and that shortly thereafter Cole met Hartley and said that he had forgotten

one item and was only willing to pay Hartley $31.00 instead of $50.00 that Hartley refused to acquiesce in that change, that Cole did not pay Hartley anything nor pay the bills referred to but went to the agister and paid his charge and took the four mules and removed them to the farm of Blauvelt and afterwards sold two of them and received pay therefor, and that Hartley for some time did not know where the mules were but as soon as he found where they were he made demand for possession and then brought this suit. It is obvious that this proof, if true, made a case for plaintiff. Defendant did not deny that plaintiff had owned the mules, but set up and introduced evidence tending to prove a different agreement between them by virtue of which he had a right to take the mules as his own property, regardless of whether he paid for them. Under the rule of law above stated, the question whether the proof introduced by plaintiff or by defendant was to be believed was required to be submitted to the jury, even if the court thought that the defendant had the preponderance of the evidence. For the error in directing a verdict the judgment is reversed and the cause remanded.

one item and was only willing to pay Hartley $11.00 instead of $50.00 that Hartley refused to withdraw in that change, that Cole did not pay Hartley anything nor pay the mills re-ferred to but went to the agister and paid his charge and took the four mules and removed them to the farm of Blunvelt and afterwards sold two of them and received pay therefor, and that Hartley for some time did not know where the mules were but as soon as he found where they were he made lawful for possession and then brought this suit. In is contended that this proof, if true, made a case for plaintiff. Defendant did not deny that plaintiff had owned the mules, but set up and introduced evidence tending to prove a different agree-ment between them by virtue of which he had a right to take the mules as his own property, regardless of whether he paid for them. Under the rule of law above stated, the question whether the proof introduced by plaintiff or by defendant was to be believed was required to be submitted to the jury, even if the court thought that the defendant had the preppon-derance of the evidence. For the error in directing a verdict the judgment is reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 562

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6435. 66.

208 I.A. 562

William H. Howard,
appellee,

-vs-

Hartman Furniture &
Carpet Company,
appellant.

Appeal from county court
of Peoria.

Tibell, J.

This suit related to certain dealings in household furniture by the wife of William H. Howard with the Hartman Furniture & Carpet Company of Peoria. She testified for him that she was acting for her husband in those dealings and that the furniture became his. He therefore is bound by her acts. On September 14, 1914, she bought a bill of furniture from said company, made a small payment thereon, gave notes for the balance, payable in monthly installments with interest at 7%, and gave a chattel mortgage upon the furniture so purchased to secure the payment of the note. Thereafter she made some similar purchases of furniture, and on February 24, 1915, another large purchase of furniture. The company thereafter had possession of a note for the entire amount remaining unpaid on all the purchases and of a chattel mortgage on all the furniture, securing said note, payable in monthly installments with interest at 7%. This last note and mortgage each also purported to be signed by Mrs. Howard. When the furniture was bought the Howards were living at Lilly, in Tazewell county, and they afterwards lived at another place in Illinois, and they afterwards, with the consent of the

-1-

company, removed the furniture to Indiana. They made some payments, one of which at least is disputed as to amount. The company took possession of the property because of defaults in payment and sold the goods at public sale to a brother of Mrs. Howard for $250. Howard then brought this suit against the company before a justice of the peace and it was removed by appeal to the county court of Peoria county, where a jury trial resulted in a verdict and a judgment for Howard for $79.00. The company appeals.

Plaintiff's claim is that Mrs.Howard did not sign the second note and mortgage and therefore the seizure of the goods was illegal. He seems to waive the tort and seeks to recover the value of the goods taken. He produced no proof of their value, except that they brought the sum of $250. at the sale. Defendant sought to set-off or recoup the indebtedness owing to it for the goods. As it is not disputed that Mrs. Howard acted as agent for the plaintiff in buying the fowls goods, he is liable in this action for what is still owing for the goods. In this condition of the record, if the second mortgage was a forgery, still the amount unpaid according to his own proof, when the goods were sold, was $186.43, besides interest for a long period, so that on his own theory after computing the interest on that sum, there was something due from him to the defendant, Moreover, there is grave doubt whether he is not claiming $50 or more of payments to which he is not entitled. Therefore, on plaintiff's theory, the verdict should have been for the defendant in some amount.

company, caused the [illegible] in [illegible]. [illegible]
[illegible], and at [illegible] [illegible]. The
company [illegible] production of [illegible] because of [illegible]
[illegible] and sell the goods at public sale [illegible]
[illegible] the duty. Based upon [illegible] this suit against the
company before a jury after [illegible] and it was [illegible]
appeal to the county court of [illegible] county, where a jury trial
was held in a similar and a judgment was [illegible] for the
the company appellee.

Plaintiff's claim is that [illegible] did not sign the
[illegible] note and that he had [illegible] the [illegible] of the goods
was a fraud. He seeks to allege that [illegible] [illegible]
cover the value of the goods [illegible]. He [illegible] no proof of
their value, except that they weighed [illegible] at [illegible] at the
sale. Undoubtedly enough is [illegible] to [illegible] the [illegible]
value to it for the goods. It is not disputed that the
[illegible] was a good [illegible] for the [illegible] [illegible]
goods. It is [illegible] for what is which [illegible] for
the goods. If it is possible of the [illegible], it is [illegible]
[illegible] was a forgery, still the [illegible] [illegible] [illegible]
his own [illegible], when the goods were [illegible], was [illegible], [illegible]
interest for a long period, so that [illegible] [illegible]
[illegible] the interest [illegible] [illegible], [illegible] [illegible]
him to the defendant. However, there is [illegible]
he is not claiming [illegible] [illegible] [illegible] is not
[illegible]. Therefore, as [illegible] [illegible], the [illegible]
should have been for the [illegible] [illegible].

Moreover, the second note and mortgage did not supersede the first unless they were executed by Mrs. Howard. If she did not execute them, then the first mortgage was still in force and the goods covered by that mortgage were rightfully seized and sold, and plaintiff would only claim to recover for the value of the goods not in the first mortgage, and there is no proof what the value of those goods was. Plaintiff contends that defendant relied only on the second mortgage. This is a misapprehension. Defendant offered both notes and both mortgages in evidence and if the second mortgage was not executed it had a right to rely upon the first.

Plaintiff's instructions seem to ignore this first mortgage and are therefore erroneous. The court gave seriatim instructions requested by defendant and refused thirteen instructions requested by defendant. Most of these instructions stated the law correctly and were not included in the given instructions. Plaintiff's counsel does not defend the refusal of these instructions in this court, except to say that the court's action was correct, without giving reasons therefor. It would unduly and unnecessarily extend this opinion to set out each of said refused instructions and to discuss them. Many of them are stock instructions, often approved.

The judgment is therefore reversed and the cause remanded.

Contract. The second sale and mortgage did not revoke the first sales they were entirely by the debtor. If the 1st not recorded then the first mortgage was still in force and the goods covered by that mortgage were replevisable when sold, and plaintiff could only claim to recover for the value of the goods not in the first mortgage, and there is no proof that the value of these goods was. Plaintiff contends that mortgagee relied only on the second mortgage. This is a clear misunderstanding. Defendant offered both sales and both mortgages in evidence and if the second mortgage was not recorded it had a right to rely upon the first.

Plaintiff's instructions seem to ignore this first mortgage and her instructions accordingly. The court gave certain instructions requested by defendant and refused defendant's instructions requested by plaintiff. Most of these instructions stated the law correctly and were not included in the given instructions. Plaintiff's counsel that on behalf the refusal of these instructions in this court, argued in say that the court's action was correct, although giving proper instructions. It would unduly and unnecessarily extend this opinion to set out each of these refused instructions and to insert them in extenso instructions, often repeated.

The judgment is reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 570

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on October 16, 1917, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6461.

Josephine H. Dodge, appellee

vs

Reuben Bruce, appellant.

208 I.A. 570

Appeal from Peoria.

Dibell, J.

Bruce owned a certain building in the city of Peoria and he lived in Peoria. Mulcahy lived elsewhere and owned a farm in Rock Island County, upon which were mortgages. They exchanged these properties. Mrs. Josephine B. Dodge was a real estate agent in Peoria and she acted for Mulcahy in conducting this exchange and was paid commissions therefor by Mulcahy. She claims that after Mulcahy had listed his farm with her, Bruce listed his Peoria property with her and asked her to procure a farm in exchange and that she entered into a written contract with him for commissions; that after she had looked over the list of farm lands that she had for sale, she brought Mulcahy's farm to his attention and told him that she was acting for Mulcahy and he consented that she should also act for him; that she brought the parties together and took them to see the farm and took Bruce to see it the second time; that on the day when the deal was consummated and the exchange effected, Bruce persuaded her to let him tear up the contract and they arranged for a smaller commission for reasons then stated, and he paid her $100. and agreed to bring another written contract to her next morning and failed to do so, and has refused to pay her anything further. She brought this suit to recover the balance she claims to be due her under the second contract, namely $550. Bruce denies that he ever listed this property with her or ever asked her to sell it or ever offered to pay her any commissions or that she did act for him

Gen. No. 8563.

Josephine M. Doige, appellee

vs.

Peneen Bruce, appellant.

Appeal from Peoria.

208 I.A. 570

Dibell, J.

Bruce owned a certain building in the city of Peoria and he lived in Peoria. Mulcahy lived elsewhere and owned a farm in Rock Island County, upon which were mortgages. They exchanged these properties. Mrs. Josephine M. Doige was a real estate agent in Peoria and she acted for Mulcahy in consummating this exchange and was paid commissions therefor by Mulcahy. She claims that after Mulcahy had listed his farm with her, Bruce listed his Peoria property with her and asked her to procure a farm in exchange and that she entered into a written contract with him for commissions; that after she had looked over the list of farm lands that she had for sale, she brought Mulcahy's farm to his attention and told him that she was acting for Mulcahy and is compensated by the owner also not for him; that she brought the parties together and took them to see the farm and took Bruce to see it the second time; that on the day when the deal was consummated and the exchange effected, Bruce persuaded her to let him tear up the contract and they arranged for a smaller commission (for reasons then stated, and he paid her $100. and agreed in that contract written contract to her next morning and failing to do so, she refused to pay her anything further. She brought this suit to recover the balance. Bruce claims he by the later writer the second contract, merely $100. Bruce denies that he ever listed this property with her or ever asked her to sell it or ever offered to pay her any commissions or that she did not for his

in the transaction. He claims that all she did was as agent for Mulcahy. There was a jury trial. Each party testified in positive contradiction to the other and each had some positive corroboration and some corroboration by circumstances. Bruce testified that after the deal was closed, she appealed to him to pay her something and that, out of sympathy, he paid her $100, and made the check therefor read that it was in full and that it so read when he delivered it to her. She denied that those words were upon the check when she received and cashed it. They are there now. The jury found for plaintiff for the full amount of her claim.

Complaint is made by defendant of the ruling of the court in giving instructions for plaintiff. No. 1 is not subject to the criticism made upon it, because its only purpose was to tell the jury that plaintiff would not be deprived of compensation because defendant exchanged his property for other property, instead of receiving cash. No. 3 is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff had no discretion or undertaking to use any endeavor to get for the defendant anything but the price fixed upon defendant's property by defendant, and that the defendant placed no reliance upon plaintiff that she would endeavor to do anything except to obtain such price, then they are instructed that the plaintiff is entitled to be paid whatever commission the preponderance of the evidence may show to have been agreed upon, if it is so shown by the evidence, and that the plaintiffs right to recover under such circumstances would not be barred by reason of the fact that the plaintiff may have also acted for the other party to the real estate transaction, provided the defendant knew that the plaintiff so acted."

in the transaction. He claims that all she did was an agent for McCarthy. There was a jury trial. Each party testified in positive contradiction to the other but each had some positive corroboration and some corroboration by circumstances.

Bruce testified that after the deal was closed, she agreed to him to pay her something and that, out of everything, he paid her $100, and made the check therefor real that it was in full and that it so read when he delivered it to her. She denied that those words were upon the check when she received and cashed it. They are there now. The jury found for plaintiff for the full amount of her claim.

Complaint is made by defendant of the ruling of the court in giving instructions for plaintiff. No. 1 is not subject to the criticism made upon it, because its only purpose was to tell the jury that plaintiff would not be injured if compensation had been defendant exchanged his property for other property, instead of receiving cash. No. 2 is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff had no intention or understanding to use any subterfuge to put the defendant anything and the price fixed upon defendant's property by defendant, and that the defendant placed no reliance upon plaintiff that she would endeavor to do anything except to obtain such price, then they are instructed that the plaintiff is entitled to be paid whatever commission the responsibilities of the evidence may lead to have been agreed upon, if it be so shown by the evidence, and that the plaintiff's right to recover would not otherwise be barred by reason of the fact that the plaintiff may have also sought for the same party to the real estate transaction, provided the defendant was that the plaintiff so sought."

Under any ordinary construction of the language of this instruction, it assumes that there was a contract between plaintiff and defendant for the sale by plaintiff of defendant's property and that she brought about the sale of his property. As that was a sharply disputed question, it was error to give that instruction. No. 6 given is very indefinite and uncertain and might mislead the jury. It is not necessarily true that defendant was concluded by what might be thought to be reasonable inferences from his conduct, if that conduct was not known to plaintiff. We do not reverse for the giving of that instruction, but we call attention to it in order that it may be more carefully drawn at another trial. No. 7, given for plaintiff, is as follows:

"The court instructs the jury that in determining upon which side the preponderance of the evidence is, the Jury should take into consideration the opportunities of the several witnesses for knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit and probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial, and from these circumstances determine upon which side is weight or preponderance of the evidence."

This instruction entirely omits the number of witnesses testifying on either side as an element to be considered by the jury, and it directs the jury to determine from the matters specified in the instruction upon which side is the preponderance of the evidence. This instruction was held erroneous in Chicago Union Traction Co. v Hampe, 227 Ill. 346, and O'Donoghue v City of Chicago, 167 Ill. App. 349, and by this court in Eidem v C. R. I. & P. Ry. Co. 144 Ill. App. 320

Under any or literary construction of the language of this instruction, it assumes that there was a contract between plaintiff and defendant for the sale by plaintiff of defendant's property and that she brought about the sale of his property. As that was a sharply disputed question, it was error, to give that instruction. No. 6 given is very indefinite and uncertain and might mislead the jury. It is not necessarily true that defendant was convinced by what might be thought to be reasonable inference from his conduct, if that conduct was not known to plaintiff. We do not reverse for the giving of that instruction, but we call attention to it in order that it may be more carefully drawn by another trial. No. 7, given for plaintiff, is as follows:

"The court instructs the jury that in determining which side the preponderance of the evidence is, the jury should take into consideration the credibility of the several witnesses for knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit and probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial, and from these circumstances determine upon which side is weight or preponderance of the evidence."

This instruction entirely omits the number of witnesses testifying on either side as an element of consideration by the jury, and it directs the jury to determine from the matters specified in the instruction each side is the preponderance of the evidence. This instruction was held erroneous in Chicago Union Traction Co. v Kemp, 204 Ill. 244, and O'Donohue v City of Chicago, 207 Ill. 199, and by this court in Tilem v C. S. I. R. R. Co. 244 Ill. 479, 480

and Sullivan v Sullivan 139 Ill. App. 378. Instructions very much more carefully drawn than this are sharply criticized in E. J. & E. Ry. Co. v Lawlor, 138 Ill App. 280, and 229 Ill. 531, Lyons v Ryerson, 243 Ill. 409, and Lyons v Chicago City Ry. Co. 258 Ill. 75. As said in Chicago Union Traction Co. v Hampe, supra, it is doubtful whether such an instruction should limit the jury to the consideration of the matters particularly pointed out in the instruction. There is always danger of omitting some proper element in such an instruction. In this case the question of the candor and fairness or lack thereof of the respective withesses is omitted, and perhaps some other considerations. It is argued that the giving of this instruction is not reversible error because there were no more witnesses on one side than the other. We do not think that position fairly applicable to this case. On this points where plaintiff had a witness to corroborate her, defendant did not. On the points where defendant had a witness to corroborate him, plaintiff lacked corroboration. On one or two points defendant had more witnesses in corroboration than did plaintiff on any other. The case is exceedingly close upon the facts and we think it should be submitted to another jury. Plaintiff relies upon what are alleged to be rules of the court below, but they are not in this record.

The judgment is reversed and the cause remanded.

and Sullivan v Sullivan 158 Ill. App. 372. Instructions very much more carefully drawn than this are sharply criticized in E. J. & E. Ry. Co. v Lesler, 154 Ill. App. 490, and 229 Ill. 621, Lyons v Hyerson, 243 Ill. 409, and Lyons v Chicago City Ry. Co. 229 Ill. 73. As said in Chicago Union Traction Co. v Hampe, supra, "it is doubtful whether such an instruction should limit the jury to the consideration of the matters particularly pointed out in the instruction. There is always danger of omitting some proper element in such an instruction. In this case, the question of the credibility and fairness or lack thereof of the respective witnesses is omitted, and perhaps some other considerations. It is argued that the giving of this instruction is not reversible error because there were no more witnesses on one side than the other. We do not think that position fairly applicable to this case. On the points where plaintiff had a witness to corroborate her, defendant did not. On the points where defendant had a witness to corroborate him, plaintiff lacked corroboration. On one or two points defendant had more witnesses in corroboration than did plaintiff on any other. The case is exceedingly close upon the facts, and we think it should be submitted to another jury. Plaintiff relies upon what are alleged to be rules of the court below, but they are not in this record.

The judgment is reversed and the cause remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 578

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6361.

William C. Boldt, appellee

vs

American Bottel Company,

appellant.

208 I.A. 578

Appeal from LaSalle.

Niehaus, J.

This is an appeal from a judgment recovered in the circuit court of LaSalle County by the appellee William C. Boldt against the appellant, American Bottel Company, for the sum of $3,700.00 damages, for injuries sustained by appellee while in the employ of appellant.

The appellee was injured while at work trying to remove a bolt from a lehr in the plant of appellant, which is located at Streator. A lehr is a conveyor constructed and used to carry glass bottles through a brick arch oven-like structure about seventy five feet long, for annealing purposes. The lehrs are made of strips of steel called pans, which are flat, about four inches wide, seven and a half feet long, and fastened across a double row of chains, near the end of the steel pans; the links of the chains are held together by bolts, which can be removed for the purpose of taking the lehr apart. The lehr or conveypr when in operation is an endless belt of flat steel pans, about seven and a half feet wide; and it moves through the oven-like structure , from one end to the otherm, and about three feet above the floor. To operate the lehr, two sprocket wheels are used, about thirty inches in diameter, located at the end of the structure mentioned; and the sprockets fit into the links of the chains on the respective sides of the lehr. When the lehr in question was in operation, it moved from the south to the north; and the sprocket wheels were situated at the north end.

On the day of appellees injury, he was directed by the

Gen. No. 6361.

208 I.A. 578

William C. Holt, appellee

vs

Appeal from LaSalle.

American Bottled Company,

appellant.

Mielmann, J.

This is an appeal from a judgment recovered in the circuit court of LaSalle County by the appellee William C. Holt against the appellant, American Bottled Company, for the sum of $3,700.00 damages, for injuries sustained by appellee while in the employ of appellant.

The appellee was injured while at work trying to remove a bolt from a lehr in the plant of appellant, which is located at Streator. A lehr is a conveyor constructed and used to carry glass bottles through a brick arch oven-like structure about seventy five feet long, for annealing the cases. The lehrs are made of strips of steel called pans, which are flat, about four inches wide, seven and a half feet long, and fastened across a double row of chains, near the end of the steel pans; the links of the chains are held together by bolts, which can be removed for the purpose of taking the lehr apart. The lehr or conveyor when in operation is on rollers built of flat steel pans, about seven and a half feet wide; and it moves through the oven-like structure , from one end to the other, and about three feet above the floor. To operate the lehr, the sprocket wheels are used, about thirty inches in diameter, located at the end of the structure mentioned; and the sprockets fit into the links of the chains on the respective sides of the lehr. When the lehr in question was in operation, it moved from the south to the north; and the sprocket wheels were situated at the north end.

On the day of appellee's injury, he was directed by the

foreman of the department in which he was employed to assist in the work of taking apart the lehr in question; and he was to work with another employe by the name of Dodge. The lehr was to be taken apart in eight foot sections for the purpose of making repairs on it; and appellee and Dodge worked on the bolts on the east side of the lehr; two other workmen worked to remove the bolts on the west side, at the same time In order to separate the eight foot sections, the lehr was drawn out from the structure through which it passed, and laid on piles of ware boards and planks; in order to remove the bolts it was necessary for the workmen to lay on the floor under the lehr, and while lying on their backs or sides with the lehr but a few feet above their faces, to use a heavy hammer in pounding at the bolts, and finally at a drift pin which had to be inserted into the link to accomplish the task.

The declaration in stating appellee's cause of action alleges, that the appellee at the time of the injury was employed in the work of separating a section of the lehr in question; and at the time of the injury was engaged in striking at a drift pin with a hammer, for the purpose of removing one of the bolts mentioned; that it was the duty of the appellant at that time to hold up the lehr and each part thereof, on the under side, at the place where the appellee was then working, which the appellant carelessly and negligently failed to do; and that in consequence thereof, one of the metal pans of the lehr fell away from said bolt or lehr and got in the way of the head of the hammer which appellee was using, and deflected the blow, which he struck at the pin; and caused the hammer to glance off and strike the left eye of the appellee, which was thereby badly crushed, and bruised, and the sight thereof permanently destroyed. It is also alleged in the second count that the physical conditions under which appellee was required

foreman of the department in which he was employed to assist in the work of taking apart the lathe in question; and he was to work with another employe by the name of Ludge. The lathe was to be taken apart in eight foot sections for the purpose of making repairs on it; and appellee and Ludge worked on the bolts on the east side of the lathe; two other workmen worked to remove the bolts on the west side, at the same time. In order to separate the eight foot sections, the lathe was drawn out from the structure through which it passed, and laid on piles of wooden blocks and planks; in order to remove the bolts it was necessary for the workmen to lay on the floor under the lathe, and while lying on their backs in close with the lathe but a few feet above their faces, to use a heavy hammer in pounding at the bolts, and finally at a drift pin which had to be inserted into the link to accomplish the task.

The indictment in matting appellee's motion of notice alleges, that the appellee at the time of the injury was employed in the work of separating a section of the lathe in question; and at the time of the injury was engaged in striking at a drift pin with a hammer, for the purpose of removing one of the bolts mentioned; that it was the duty of the appellant at that time to hold up the lathe and such part thereof, on the under side, at the place where the appellee was then working, which the appellant negligently failed to do; and that in consequence thereof, one of the metal pots of the lathe fell away from such part of lathe and struck in the way of the head of the hammer which appellee was using, and left entire the blow, which he struck at the pin; and caused the hammer to glance off and strike the left eye of the appellee, which was thereby badly crushed, and the sight thereof permanently injured. It is also alleged on the second count that the physical conditions under which appellee was required

to work, which prevailed at the place where he was working, rendered it unsafe for appellee to do the work he was directed to perform.

The appellee's testimony is to the effect, that at the time of the occurrence in question, he and Dodge were working on the east side of the lehr to remove a bolt, and that Dodge was lying under the lehr pounding at the bolt while appellee was lying by his side holding up the lehr; and two other workmen were at work under the conveyor on the west side, and had already removed the bolt on that side, while he and Dodge were still working on the east side; that Dodge's arm finally became exhausted, and that he thereupon offered to change places with Dodge, and then took Dodge's place in handling the hammer; Dodge however neglected to take appellee's place to hold up the pans of the lehr, which on account of the removal of the pin on the west side, or on account of the natural sag incident to the position of the lehr, dropped down, and got in the way of appellee's hammer, in such a way that when he struck the drift pin with the hammer the last time before the injury, the stroke of the hammer, which glanced off of the head of the drift pin struck the metal pans and was deflected thereby in its course so as to hit appellee in the eye.

We think the jury were warranted in finding from the appellees testimony considered with the other evidence in the case, that the negligence of appellee's fellow workman in failing to hold up the lehr while the appellee was hammering at the drift pin, as charged in the declaration, was the proximate cause of the injury to appellee. The appellant having rejected the Workmen's Compensation Act of 1913, appellees right of recovery was not affected by any question of assumed risk or contributory negligence; nor by the fact, that the negligence which caused the injury, was the negligence of a fellow servant. Von Boeckman

to work, which prevailed at the place where he was working, rendered it unsafe for appellee to do the work he was directed to perform.

The appellee's testimony is to the effect, that at the time of the occurrence in question, he and Dodge were working on the east side of the lehr to remove a mold, and that Dodge was lying under the lehr pointing at the hole while appellee was lying by his side holding up the lehr; and two other workmen were at work under the conveyor on the west side, and already removed the bolt on that side, while he and Dodge were still working on the east side; that Dodge's arm finally became exhausted, and that he thereupon offered to change places with Dodge, and then took Dodge's place in handling the hammer; Dodge however neglected to take appellee's place to hold up the pan of the lehr, which on account of the removal of the pin on the west side, or on account of the natural sag inherent to the position of the lehr, dropped down, and yet in the way of appellee's hammer, in such a way that when he struck the drift pin with the hammer the last time before the injury, the stroke of the hammer, which glanced off of the head of the drift pin strook the metal pans and was deflected thereby in its course so as to hit appellee in the eye.

We think the jury was warranted in finding from the appellees testimony considered with the other evidence in the case, that the negligence of appellee's fellow workmen in failing to hold up the lehr while the appellee was removing the drift pin, as charged in the declaration, was the proximate cause of the injury to appellee. The Appellant further relied the Workmen's Compensation Act of 1911, applicable right of recovery was not affected by any question of assumed risk or contributory negligence; nor by the fact, that the negligence which caused the injury, was the negligence of a fellow servant. The Workmen

v Corn Products Refining Company, 274 Ill. 605; Bell v Toluca Coal Company, 272 Ill. 576; Devine v Delano, Id. 166.

It is contended however that appellee failed to prove that appellant had rejected the Workmen's Compensation Act, which was a material allegation in his declaration. There is evidence in the record to prove, that such rejection was made by appellant. The sufficiency of the proof in that regard appellant is not in position to question, because, by the seventh instruction, which was given to the jury at its instance, it admitted the fact that it was not working under the provisions of the compensation act, in connection with the point made in the instruction, and although it had not come under the provisions of the act, it was not liable to its employes for injuries suffered in the course of their employment, unless such injuries were caused by its negligence. Appellant also argues as a ground for reversal of the judgment, that the court erred in refusing the 17, 20, 21, 22, 23 and 24 instructions which were requested by appellant. We have examined the instructions designated, and are of opinion that they were properly refused. The amount of damages fixed by the jury in view of the seriousness of the injury, which resulted in the permanent loss of sight of appellees left eye, cannot be regarded excessive. The judgment is affirmed.

Judgment affirmed.

v Corn Products Refining Company, 47 Ill. 265; Bell v Delano Coal Company, 47 Ill. 278; Devine v Delano, id. 189.

It is contended however that appellee failed to prove that appellant had rejected the Workmen's Compensation Act, which was a material allegation in his declaration. There is evidence in the record to prove, that such rejection was made by appellant. The sufficiency of the proof in that regard appellant is not in position to question, because, by the seventh instruction, which was given to the jury at its instance, it admitted the fact that it was not working under the provisions of the compensation act, in connection with the point made in the instruction, and although it had not done under the provisions of the act, it was not liable to its employes for injuries sustained in the course of their employment, unless such injuries were caused by its negligence. Appellant also argues as a ground for reversal of the judgment, that the court erred in refusing the 17, 20, 21, 22, 23 and 24 instructions which were requested by appellant. We have examined the instructions designated, and are of opinion that they were properly refused. The amount of damages fixed by the jury in view of the serious nature of the injury, which resulted in the permanent loss of sight of appellees left eye, cannot be regarded excessive. The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

208 I.A. 579

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 6401. [illegible].

208 I.A. 579

Charles Whitney,

-vs-

Frank C. Seidel,
Appellee,
Lawrence A. Doolittle,
Appellant.

Appeal from Circuit Court
Lake County.

Niehaus, J.

In this case a bill of interpleader was filed by Charles Whitney in the circuit court of Lake County, to determine whether the appellant, Lawrence A. Doolittle, or the appellee, Frank C. Seidel, was entitled to the sum of $1100.05 which had been held by the complainant in escrow, and was claimed by each of said parties. The complainant paid the money into court and the court thereupon entered a decree discharging him from liability, and directing the parties to interplead. The cause was referred to the Master, who heard the evidence and reported it, together with his conclusions, to the court. The Master reported that the appellant was entitled to the fund in question, but exceptions were filed to his report some of which were sustained by the court, and the court thereupon decree that the appellee was entitled to the sum of $841.52 of the fund, and that the balance should be paid to the appellant, and that each party pay one half the costs. From this decree an appeal is prosecuted and the appellee has assigned cross errors. The proof shows that on February 10, 1911, the appellant Doolittle and the appellee Seidel entered into a written contract for the sale and transfer to appellant of a certain stock of goods and store fixtures which were then owned by the appellee, and this con-

tract is as follows:-

" Memorandum of agreement made this 10th day of February, 1911, between Frank C.Seidel of the first part and Lawrence Doolittle of the second part witnesseth.

That said Seidel has this day sold to Lawrence Doolittle the fixtures and stock of goods, wares and merchandise in the store 119 North Genesee Street, Waukegan, Illinois, on the following terms, viz., the fixtures at $2500 and not to exceed $7000. of said stock of goods to be paid for as follows:

Fixtures cash $2500 on or before March 20, 1911, and said stock of goods cash on or before March 20th, 1911, as follows: 60 per cent of said $7000.00 to be paid in cash in full payment for said goods, invoice to be taken on or before March 20, 1911, by the parties, and said goods to be invoiced at the following prices, viz.: cost price as shown by original invoices or at the prices at which said goods were invoiced on January 1st, 1911, at the option of said Doolittle and said invoice so taken by the parties to be the basis of the sale price herein mentioned at 60 per cent thereof.

Lease of store to be assigned to said Doolittle on March 20th,1911, said Seidel to remain in possession and conduct said business until March 20th,1911 at his own delivering to said Doolittle on said March 20th,1911, said fixtures and said goods of invoice value not to exceed $7000.00.

Said Doolittle has paid herein on this day $1500 to be held in escrow by Charles Whitney of Waukegan,Illinois, until delivery of the fixtures and goods hereby sold. Said Whitney is to receipt for $1500 escrow when same is paid to him.

By fixtures are meant all the fixtures used by said Seidel in his business. This contract to be held by said Whitney for the benefit of both parties.

Witness the hands and seals of the parties the day and year above written.

F.C.Seidel, (SEAL)
L.L.Doolittle (SEAL)."

The $1500.00 mentioned in the contract was paid over by the appellant to Charles Whitney, and is the same fund involved in this controversy. After the execution of the contract and the payment of the $1500.00 by the appellant, the appellee continued in the possession of the stock of goods and

fixtures referred to in the contract and conducted the business with a view to reducing the stock to an amount below $7000.00- invoice value. He advertised and conducted special sales and auctions in addition to the sales made in the regular course of business. On March 19, 1911, however, the day before he was to turn over the stock remaining and the fixtures and business to the appellant, there was still on hand between $8,000.00 and $9,000.00 worth of goods according to invoice values. On this day, which was Sunday, the appellee without the knowledge or consent of the appellant, secretly took from the stock of goods the choicest and the most salable goods, amounting in value to about $4,500.00; this portion of the stock was crated and boxed, and removed by him from the store after dark on the same day. The next day when the appellant came to the store to make final arrengements for the transfer of the stock and fixtures to him he noticed the sudden deficiancy in the stock and inquired of the appellee about it. The appellee admitted that a large portion of the stock had been suddenly removed but claimed that he had sold it to a certain party. The parties took an inventory of the remaining goods, which amounted to $4,257.77, according to the invoice values. During the taking of the inventory of the remaining goods the effect of the removal of the goods taken by the appellee became more and more apparent to the appellant; and he protested that the goods left were mostly old and shop worn stock, which had accumulated in the course of years in appellee's business, and that from a business point of view he had been placed in a disadvantageous position by the appellee's act of removal of that part of the stock taken by

him; that the remainder of the stock had thereby become less valuable. The appellee suggested that the appellant could fill up the depleted stock with new goods to advantage, and the appellant insisted that appellee's act of removal was not in compliance with his contract, but finally offered 40 cents on the dollar for the stock that had been left in the store. This the appellee would not agree to accept; afterwards the appellee offered to return the stock which he had removed, the offer, however, was refused by the appellant because he claimed he at that time had lost faith in the appellee's integrity and therefore could not feel certain under the circumstances that the same or all the goods would be returned, and rescinded the contract. The appellee thereupon served notice on the appellant that he would hold him liable for any damages incurred by him in disposing of the remainder of the stock and fixtures, which he proceeded to do, and he claims to have lost $1,000.00 on the fixtures and $2,[illegible].00 in disposing of the remainder of the goods.

The court found that the appellant had violated the contract by refusing to accept the stock in the condition that it was after the removal of that portion taken by appellee; and that appellee had suffered damages in consequence thereof to the amount of $841.77, and therefore directed by the decree that this amount be paid to the appellee out of the fund in question.

The vital question in the case is whether the appellant or the appellee violated the obligations assumed by the contract. By the terms of the contract there was a sale of the stock and

fixtures to the appellant, and the rights of the appellee with reference to the stock were limited to conducting the business, which the contract provides might be conducted as his own for the purpose, however, of reducing the stock to a sum below $7,000.00. It is clear that the contract contemplated that this reduction should be made by conducting sales, and under this arrangement specially advertised sales, and sales by means of an auction were legitimate and proper in view of the object to be accomplished, and must be regarded as coming within the contemplation of the parties. But it is also evident that under the terms of the contract appellee did not have the right to appropriate to his own use andbenefit the best and most valuable portion of the stock, and the fact that this was done by the appellee in a secret and surreptitious manner and that he made an effort to deceive the appellant by telling him he had sold it and had been paid for it, is proof strongly tending to show that the appellee was not acting in good faith. We are of opinion that the removal and appropriation to his own use by the appellee of the portion of the stock referred to was clearly a fraud upon the rights of the appellant, and the evidence shows he would have been damaged thereby if the transaction contemplated by the contract had been completed. The appellant was therefore legally justified in rescinding the contract; and the contract was rescinded by the appellee. The legal effect of this rescission entitled the appellant to a return of the money which he had paid which was held in escrow under the contract. The decree should therefore have directed that the money be returned to him. And the decree is therefore reversed and the cause is remanded with directions

that a decree be entered directing the fund in question to be paid to the appellant and taxing the costs of this proceeding against the appellee.

In view of the conclusions reached it is unnecessary to discuss the cross errors assigned by the appellee.

Reversed and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 580

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 16 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6431.

George Kopf, appellee

vs

Amos Yordy, appellant.

Appeal from Stephenson.

208 I.A. 580

Niehaus, J.

This case has been before this court on a prior appeal and was then reversed and remanded. Kopf v Yordy, 220 Ill. App. 419. George Kopf the appellee brought this suit on a promissory note, dated Oct. 12, 1913, payable one year after date, for the sum of $1500.00 with interest at the rate of 6% per annum payable semi-annually; and the appellant signed the note as endorser, at the time of its execution by the makers Robert R. Prall and Vina W. Prall. The note was secured by a trust deed, executed at the same time, on a lot in Coates Addition in the city of Freeport. The trust deed was not recorded by the appellee, who was the payee of the note, until December 1914. In the mean time another trust deed was executed by Robert R. and Vina W. Prall, the owners of the premises in question, and was put on record October 27, 1913; and the first trust deed held by appellee was thereby deprived of its priority; and its value as a security for the note was thereby practically lost.

The facts relative to the signing of the note by the appellant, and the points of the controversy, and the law applicable thereto, are set forth in the former opinion.

Upon the reinstatement of the case in the trial court the appellant filed four additional pleas. The court sustained a general demurrer to the second, third and fourth additional pleas; and the appellant stood by these pleas; and the ruling of the court sustaining the demurrer is assigned as error. We are of opinion, that the demurrer was properly sustained.

Gen. No. 6431.

George Kopf, appellee

vs

Amos Yortly, appellant.

Appeal from Stephenson.

208 I.A. 580

Mr. Justice, J.

This case has been before this court on a prior appeal and was then reversed and remanded. Kopf v Yartly, 200 Ill. App. 419. George Kopf the appellee brought this suit on a promissory note, dated Oct. 12, 1914, payable one year after date, for the sum of $1500.00 with interest at the rate of 8% per annum payable semi-annually; and the appellant signed the note as maker, at the time of its execution by the makers Robert R. Frail and Vina V. Frail. The note was secured by a trust deed, executed at the same time, on a lot in Coates Addition in the city of Freeport. The trust deed was not recorded by the appellee, who was the payee of the note, until February 1914. In the mean time another trust deed was executed by Robert R. and Vina V. Frail, the owners of the premises in question, and was put on record October 27, 1913; and the first trust deed held by appellee was thereby destroyed as to its priority; and its value as a security for the note was thereby practically lost.

The facts relative to the signing of the note by the appellant, and the points of the controversy, and the law applicable thereto, are set forth in the former opinion.

Upon the retrial of the case in the trial court the appellant filed four additional pleas. The court sustained a general demurrer to the second, third and fourth additional pleas; and the appellant stood by those pleas; and the ruling of the court sustaining the demurrer is assigned as error.

We are of opinion, that the demurrer was properly sustained.

The pleas to which the demurrer was sustained were drawn upon the theory, that it was a defense to appellant's liability as endorser of the promissory note, that the appellee failed and neglected to redeem from the Master's sale, which took place after the commencement of this suit under the other trust deed, which had become a first lien because of its prior recording; as a matter of law such failure to redeem by the appellee was not available to appellant as a legal defense to his liability as endorser. The appellant had the right, if he saw fit to exercise it, of paying the note held by appellee, and becoming subrogated to rights of appellee under the trust deed, and of making the redemption from the sale; and thereby securing for himself whatever financial benefits might have resulted from such a procedure, but the appellee was not bound to exercise this right of subrogation for him. If he had failed to record the trust deed because of his own neglect, and this failure on his part, under these circumstances resulted in a loss to the appellant as surety on the note in question, such loss could be pleaded by the appellant to offset to the extent of the loss, the amount due, and sued for on the note. As to whether the appellee of his own accord, failed to record the trust deed in question, or did not record it because of a request of the appellant, was a question of fact; and was in issue under the first additional plea filed by the appellant; and it was a matter concerning which there was a sharp conflict in the evidence between the appellant and the appellee. The jury decided this question of fact in favor of the appellee; taking his version of the matter as the true one. There is nothing in the record, which would warrant this court in holding that under the circumstances presented, the jury should have found the other way; or that they should have taken the statement of the appellant con-

The pleas to which the demurrer was sustained were drawn upon the theory, that it was a defense to appellant's liability as endorsee of the promissory note, that the appellee failed and neglected to redeem from the Master's sale, which took place after the commencement of this suit under the other trust deed, which had become a first lien upon the property of its prior recording; as a matter of law such failure to redeem by the appellee was not available to appellant as a legal defense to his liability as endorser. The appellant had the right, if he saw fit to exercise it, of paying the note held by appellee, and becoming subrogated to rights of appellee under the trust deed, and of making the redemption from the sale; and thereby securing for himself whatever financial benefits might have resulted from such a procedure, but the appellee was not bound to exercise this right of subrogation for him. If he had failed to record the trust deed because of his own negligence, and this failure on his part, under the circumstances resulted in a loss to the appellant as payee of the note in question, such loss could be pleaded by the appellant, in offset to the extent of the loss, the amount due, and sued for on the note. As to whether the appellee or his son acted, failed to record the trust deed in question, or if he did record it because of a request of the appellant, was a question of fact; and was in issue under the first additional plea filed by the appellant; and it was a matter concerning which there was a sharp conflict in the evidence across the appellant and the appellee. The jury resolved this question of fact in favor of the appellee; taking his version of the matter as the true one. There is nothing in the record, which would warrant this court in holding that under the circumstances presented, the jury should have found the other way or that they should have taken the statement of the appellant con-

cerning this controverted matter, in preference to the statement of the appellee; nor is it apparent, that another jury would reach a different verdict.

It is contended also, that incompetent evidence was admitted by the proof of the conversations that took place at the time the note was signed by the appellant. Conversations admitted in evidence for the purpose of varying or changing the character of the appellant's liability or legal obligation as an endorser would undoubtedly be erroneous; but the conversations admitted in evidence were not of this character, and did not have this effect; and the court expressly instructed the jury, that the obligation of the appellant, assumed by signing his name, was that of endorser; and that his obligation as endorser could not be changed by parol evidence. So this placed the evidence in the correct legal position before the jury. It is also urged, that the court erred in the refusal of three instructions requested by the appellant. The substance of the first refused instruction which pointed to the alleged negligence of the appellee in recording his trust deed, whereby the benefit of security was lost to appellant, is contained in the fifth given instruction. This is true also with reference to the second refused instruction. These two instructions were properly refused therefore, because the court was not bound to give more than one instruction on the same point. So far as the third refused instruction is concerned, it contains the statement, that the appellant would be released as endorser on the note in question, if the appellant had failed to exhibit the note sued on, and demand payment thereof from the makers, on October 13, 1913, or the day thereafter. The evidence shows that October 13, 1913 was Sunday; and the note therefore according to the statute became due on the day following, which was the 13th. of October; and the demand for payment could

have been legally made on the 13th. or on the day following, which was the 14th. The court properly refused this instruction therefore, because of the incorrect statement of the time when demand should have been made.

The record does not disclose any reversal error and the judgment is therefore affirmed.

Judgment affirmed.

have been legally made on the 18th, or on the day following, which was the 19th. The court properly refused this instruction therefore, because of the incorrect statement of the time when issued should have been made.

The record does not disclose any reversal error and the judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

3617

208 I.A. 610

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 23 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6421. 20.

208 I.A. 610

John C. Stires, et al,
Appellees,
-vs-
Augustus E. Kindell,
Appellee,
and John S. Kindell,
et al,
Appellants.

Appeal from Ogle.

Dibell, J.

In this action, (called assumpsit in the summons and title, and called debt in the body of the pleadings) plaintiffs, as assignees of two pomissory notes made by John E.Kindell,now deceased, seek to recover thereon against his devisees and his executrix under the statute of frauds and perjuries. After the suit was begun the death of one of the devisees was suggested, and his name was dropped from the pleadings. Plaintiffs by leave of court filed an amended declaration, and therein charged that the personal estate of the said John E. Kindell, deceased, was sufficient to pay only the first class claims and part of the second class claims allowed against his estate, and was insufficient to pay any part of these notes. Defendants filed a plea of nil debit and a special plea which set up the administration and its completion, and the failure of the plaintiffs to file the notes as a claim against the estate, and the limitation of one year provided in the administration act. Plaintiffs demurred to said special plea. The demurrer was overruled. Plaintiffs elected to abide by said demurrer and there was a judgment in bar against them. Thereafter, at the same term of court,that judgment was vacated and the demurrer was sustained to said special plea. Afterwards, the executrix alone filed another special ple

208 I.A. 610

John C. Ettren, et al,
appellees,

-vs-

Appeal from Tyler.

Augustus K. Kimball,
appellee.

and John K. Kimball,
et al,

Appellants.

Tidell, J.

In this action, (called assumpsit in the summons and title, and called debt in the body of the pleadings) plaintiffs, as assignees of two promissory notes made by John B. Kimball, deceased, seek to recover thereon against his heirs and his executrix under the statute of frauds and perjuries. After the suit was begun the death of one of the defendants was suggested, and his name was dropped from the pleadings. Plaintiffs by leave of court filed an amended declaration, and therein averred that the personal estate of the said John B. Kimball, deceased, was sufficient to pay only the first class claims and part of the second class claims allowed against his estate, and was insufficient to pay any part of these notes. Defendants filed a plea of nil debit and a special plea which set up the administration and its completion, and the failure of the plaintiffs to file the notes as a claim against the estate, and the limitation of one year provided in the administration act. Plaintiffs demurred to said special plea. The demurrer was overruled. Plaintiffs elected to abide by said demurrer and there was a judgment in bar against them. Thereafter, at the same term of court, that judgment was vacated and the demurrer was sustained to said special plea. Afterwards, the executrix alone filed another special plea

seeking to avail of said limitation in the Administration act. Plaintiffs replied, alleging that the estate of said deceased was not inventoried or accounted for by said executrix as alleged by her in said special plea. Defendants filed a similiter to this plea and to the plea of nil debit, and upon these issues the cause was tried without a jury. There was a finding for plaintiffs against defendants for Five Hundred Fifty-six dollars and Fourteen cents ($556.14) and costs, with an award of execution, and the further order that the judgment as to the executrix be quando acciderent. An appeal was allowed to all, either or any of the defendants, which was peffected by all the defendants except Augustus E. Kindell, and except that the appeal bond does not appear to be executed by the executrix in her capacity as executrix but only in her own right, she being also one of the devisees. There is no bill of exceptions in the record.

The question chiefly argued here is whether, there having been due administration of the estate, and the notes of plaintiffs not being contingent, and they not having presented their claim against the estate in the county court, they are barred in this suit by the limitation prescribed in the Administration act, or are only governed by the general statutes of limitation. Plaintiffs rely upon Ryan vs.Jones, 15 Ill. 1. Both sides rely on Union Trust Co. vs.Shoemaker, 258 Ill. 564. Many decisions of our supreme court between those two cases are cited and relied upon by the respective parties, the more important of which are cited in the last named case. We have reached the conclusion that the special plea to which the court sustained the demurrer is bad in substance. It alleges that the defendants ought not to be charged with the said debt by virtue of such supposed writings obligatory, (meaning the two promis-

seeking to avoid of said limitation in the limitation time.

Plaintiffs replied, alleging that the estate of said decedent was not improvidently administered for by the administrator as alleged by her in said special plea. Defendants filed a rejoinder to this plea and to the plea of nil debit, and upon these issues the cause was tried without a jury. There was a finding for plaintiffs against defendants for Five Hundred Fifty-six dollars and Fourteen cents ($556.14) and costs, with an award of execution, and the further order that the judgment is to the executrix be paid accordingly. An appeal was allowed by all, either or any of the defendants, which was perfected by all the defendants except Augustus H. Hinkel, and except that the appeal bond does not appear to be executed by the executrix in her capacity as executrix but only in her own right, not being also one of the sureties. There is no bill of exceptions in the record.

The question briefly stated here is whether, there having been due administration of the estate, the suit of plaintiffs not being continuous, and they not having presented their claim against the estate in the county court, they are barred in this suit by the limitation prescribed in the administration act, or are only barred by the general statute of limitations. Plaintiffs rely upon Ryan v. Lane, 16 Ill. 1. Both sides rely on Union Trust Co. v. Chamberlin, 208 Ill. 366. Many decisions of our supreme court between these two cases are also relied upon by the respective parties, the more important of which are cited in the last named case. We are reminded the contention that the special plea is bad in that it does not contained the manner in bar in abatement. It alleges that the defendants ought not to be charged with the suit, but by virtue of such supposed writings obligatory, therein the principal

sory notes). In the conclusion of the plea the defendants pray judgment if they ought to be charged with said debt by virtue of said supposed writings obligatory, without specifying which one. We will assume that this conclusion should be treated as if it read,"writings obligatory". The plea is by all of the defendants then in the case, including the executrix of the last will and testament of John T. Kindell, deceased, as such, as well as in her own right. The body of the plea does not claim to set up a complete right to a judgment for the defendants, for, after setting up the administration, it says: "Thereby said alleged claims of said plaintiffs in said declaration mentioned became and were absolutely barred against these defendants, except as to the estate of said John T. Kindell, deceased, which has not been and was not inventoried and accounted for by the said Jeanette Kindell, as such executrix; and this the defendants are ready to verify, etc.," In other words, the plea concedes that the plaintiffs were entitled to a judgment against the executrix, quando acciderent, and yet prays a judgment in bar as to all the defendants, including the executrix,contrary to the admission in the plea. It is said in 1 Chitty's Pleadings, 555, that when the matter pleaded is particularly applicable only to part of the declaration, the commencement of the plea should be expressly and in terms limited to that part, and that doctrine is applied to a plea of tender on page 550. In 3 Chitty's Pleadings, page 921 and subsequent pages, are forms of pleas which show that both as to the commencement and prayer, that should be excepted from the commencement and prayer which the plea concedes to be valid. For instance; If a defendant were sued upon a note for one hundred dollars, and the plea was payment or some other discharge as to fifty dollars of the sum demanded, a plea which in its

-3-

commencement and conclusion professes to bar the whole action on the note would be bad if it set up only satisfaction of the claim as to fifty dollars. These rules are applied in Moir v. Harrington, [illegible] Ill. 40; People v.McCormick, 68 Ill. [illegible]36; Sandusky v.Exchange Bank, 81. Ill. 853; Dickerson v.Hendryx, 88 Ill. 66; Gebbie v.Mooney, 121 Ill. 255; People v.McClellan, 137 Ill. 352; People v.Union Gas Co., 260 Ill. 392; and Kopf v. Yordy, 200 Ill. App. 409. A plea by several defendants must be good as to all who interpose it, or a demurrer is properly sustained to it. "If it is bad for one, it is bad for all. Beesley v.Hamilton, 50 Ill. 88; 1 Chitty's Pleadings, 545, 546. This plea, therefore, was bad as to the executrix who joined therein. It was therefore bad as to all the defendants. The demurrer was therefore properly sustained regardless of the question which statute of limitations applies.

As the evidence is not preserved by a bill of exceptions we must assume that the judgment is justified under the pleadings upon which the issue was joined, which includes the plea that the estate wasnot inventoried or accounted for in the administration. The judgment against the executrix is in Latin, whereas it should be in English, but that is not assigned for error. We will grant a certificate of importance and appeal, if requested.

The judgment is affirmed.

commencement and conclusion professors to be the whole citizen on the role would be had if it set up only satisfactories of the claim as to fifty dollars. These rules are applied in Weir v. Harrington, 74 III. 43; People v. McGonnack, 63 III. 198; Sandusky v. Lehmuge Bank, 81. III. 383; Stimson v. Hartman, 83 III. 65; Gallie v. Mooney, 121 III. 235; People v. Mellin, 147 III. 321; People v. Union Gas Co., 140 III. 387; and Loyd v. Yordy, 200 III. 409. 409. A plea by several defendants must be good as to all who interpose it, or a demurrer is properly sustained to it. If it is bad for one, it is bad for all. Beasley v. Hamilton, 50 III. 85; Illinois Filtering, 144, 384. This plea, therefore, was bad as to the exemption who joined therein. It was therefore bad as to all the defendants. The demurrer was therefore properly sustained regardless of the question which at the of limit time in line.

As the evidence is not received by a bill of exceptions we must assume that the judgment is justified under the pleadings upon which the issue was joined, which indicates the fact that the entire vessel invented or manufactured in the combination. The judge at against the executive in the suits, stating it should be in English, but this is not sufficient for error. We will grant a certificate of importance and appeal, if requested.

The judgment is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6527 v

3618

208 I.A. 611

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV 8 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6527.

Wilhelmina Frericks, Appellant.

208 I.A. 611

vs

Appeal from Vermilion.

Hayung G. Frericks, appellee

Per Curiam:

The record before us contains an original bill and a demurrer thereto by the defendant which was sustained and an amended bill and a demurrer thereto which was sustained and then a prayer and order for appeal and the appeal perfected. The certificate of the clerk is that this is a complete transcript of the record and proceedings of the circuit court in said cause. There is no decree dismissing the bill. An order sustaining a demurrer is not appealable. The cause is still pending in the court below. It is still open to the ~~plaintiff~~ complainant to ask leave to further amend her bill. The appeal therefore is dismissed with leave to the parties to withdraw their record, abstracts and briefs respectively.

Appeal Dismissed.

Gen. No. 6911.

Wilhelmina Fretiens, appellant.

vs

Appeal from Superior.

Hayung Fretiens, appellee

Per Curiam:

The record before us contains an original will and a lawyer therefo by the testatrix which was executed and an amended will and a lawyer therefore which was executed. And then a prayer and order for appeal and the appeal perfected. The verdicts of the clerk is that this is a complete transcript of the record and proceedings of the circuit court in said cause. There is no bates filed. In order establishing a lawyer is not appealable. The cause is still pending in the court below. It is still open to the testatrix complainant to ask leave to further amend her will. The alleged therefore is dismissed with leave to the parties to stipulate that record, abstracts and briefs respectively.

Dismissed Accordingly.

208 I.A. 611

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6468

3619

208 I.A. 612

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV 22 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6488

208 I.A. 612

Henry Strohmeyer, appellee.

vs Appeal from LaSalle.

William Jamison, appellant.

Carnes. P. J.

Appellant, Williamx Jamison, owned a dwelling house in the city of Ottawa, and talked with appellee, Henry Strohmeyer, a contractor, about building a porch, and other repairs and improvements. Appellee gave him a paper writing as follows:-

"Estimate furnished by Henry Strohmeyer, contractor, etc., to W. Jamison, Estimate of following work;

14' x 19' 5" concrete cellar floor.

4' x 94' concrete sidewalk.

3' x 53' concrete sidewalk.

4' x 14' concrete sidewalk.

8' x 24' concrete porch floor.

14 foot chimney, pointing up two chimneys, cutting cellar window, cutting one doorway, and furnishing both frames. Plastering and building concrete block porch 8' x 8' x 24' for about $203.20."

Appellant told him all right, to do the work. Appellee claims there was nothing said about the kind of porch, and that he only figured on a floor and support. It is admitted that he built a porch after a pattern found ina book, but appellee says that was suggested and agreed upon after the above estimate was furnished and after he had begun work, while appellant says it was discussed and settled before that time. It is admitted by appellant that some extra work was done and he paid appellee $335. which he claims was received infull for the original estimate of $203.20, and all extra work. Appellee admits the receipt of $335. but denies that it was paid in full of his account, and claims the extra work amounted to $322.26. He brought this suit to recover the balance claimed and had judgment on a verdict for $206.06,

Gen. No. 6138

208 I.A. 612

Henry Stromeyer, appellee.

vs

Appeal from Latrobe.

William Lamison, appellant.

Clemes, P. J.

Appellant, William Lamison, owned a building lease in the city of Ottawa, and talked with appellee, Henry Stromeyer, a contractor, about building a porch, and other repairs and improvements. Appellee gave him a paper writing as follows:-

"Estimate furnished by Henry Stromeyer, contractor, etc.,

to W. Lamison, Estimate of following work;

14' x 18' 3" concrete cellar floor.

4' x 24' concrete sidewalk.

3' x 23' concrete sidewalk.

4' x 14' concrete sidewalk.

8' x 14' concrete porch floor.

14 foot chimney, painting up two chimneys, putting water water, cutting one doorway, and furnishing cut frames. Tearing and building concrete block porch 6' x 8' x 4' for steps $100.00."

Appellant told him all right, to go to the work. Another claims there was nothing said about the kind of porch, but that he only figured on a floor and sweep. It is admitted that he built a porch after a pattern found in book, but appellee says that was suggested and agreed upon after the above estimate was furnished and after he had begun work, while appellant says it was discussed and settled before that time. It is admitted by appellant that some extra work was done and he paid appellee $125, which he claims was received in full. For the original estimate of $200.00, and all extra work. Appellee claims the balance of $200, but denies that it was paid in full of his account, but claims the extra work amounted to $125.00. He brought this suit to recover the balance claimed and had judgment on a verdict for $200.00,

from which this appeal is prosecuted. Errors assigned are, in substance, that the verdict is manifestly against the weight of the evidence, and that the court erred in rulings on the evidence and instructions.

Each testified in his own behalf. It is clear that the verdict should have been for the party that the jury believed told the truth about the matter; whether the $225 was paid and received in full of the account depended upon the credit given the testimony of appellee and appellant on that question with little or no corroboration of either; whether the estimate as to the porch was made before or after the plan was discussed and adopted depended upon the credit to be given to the testimony of appellee slightly corroborated by that of his son, and the testimony of appellant slightly corroborated by that of his two daughters. It may be that the jury were inclined to believe appellee because of an opinion grounded in common knowledge that his estimate would not have covered or been expected to cover so expensive a porch as was in fact built. It was a fair question for the jury. A reading of the record leads to the conclusion that the evidence was so nearly balanced that it was within their province to find either way. The trial judge, as well as the jury, saw the witnesses and heard them testify and we would not be justified in reversing the judgment on the question of the weight of the evidence.

Appellant's complaint about rulings on evidence is as to appellee's book account, which he argues was not strictly a book account, and that no proof was made that entitled it to go in evidence or to be so treated. He is perhaps right in that contention. There was a disagreement of counsel while addressing the jury after the evidence was closed as to whether the book had been admitted in evidence, and the court told appellant's

counsel that it might be considered in without their objection or he would open the case and let the plaintiff prove the items before the jury, using the book as a memorandum; whereupon appellant's counsel consented that the book might be considered in evidence, and the court stated to the jury that counsel had withdrawn their objection to the book and that he had let the book go before the jury. This action of appellant's counsel controls that question here and estops them from urging error on that ground.

Plaintiff's third instruction is open to the objection that it tells the jury how to determine the preponderance of the evidence and omits the number of witnesses as a factor after telling them that it does not necessarily depend upon the number. What is said in F. J. & F. Ry. Co. v Lawlor, 239 Ill. 581, is applicable. A similar instruction was not held reversible error in that case or in Strauss v Gilbert 233 Ill. 441, citing and following that case, but it was stated as one ground for reversal in Lyons v Ryerson & Son, 242 Ill. 409. The cases on that question are collected in Yanloniz v Spring Valley Coal Co. 185 Ill. App. 563, where the court reached the conclusion that the instruction is reversible error when the number of witnesses is an important factor in determining the preponderance of evidence. Counsel for appellant here in attacking this instruction say- "On certain of the questions raised in this case the number of witnesses testifying for defendant was greater than the number testifying on behalf of the plaintiff," without pointing out what material question was, in their opinion, supported by the greater number of witnesses. As we have before said, the direct proof on the controlling facts was the testimony of the plaintiff as a witness contradicted by the testimony of the defendant as a witness. The question

counsel, that it might be considered in, without first objecting or be result even the same but let the plaintiff have the time before the jury, using the book as a reference; furthermore, plaintiff's counsel contended that the book might be considered in evidence, and the court stated to the jury that counsel withdrew their objection to the book and that he had let the book go before the jury. This action of plaintiff's counsel controls that question here and estops them from raising error on that ground.

Plaintiff's third instruction is open to the criticism that it tells the jury how to determine the preponderance of the evidence and omits the number of witnesses as a factor after telling them that it does not necessarily depend upon the number. What is said in L. & T. Co. v Jones, 88 Ill. 404, is applicable. A similar instruction was held reversible error in that case, or in Strauss v Sidney 102 Ill. 161, citing and following that case, but it was stated as one ground for reversal in Lyons v Pearson & Co., 193 Ill. 400.

The cases on that question are collected in Lantzin v Valley Coal Co., 158 Ill. App. 500, which contains a general conclusion that the instruction is erroneous when the number of witnesses is an important factor in determining the preponderance of evidence. Counsel for appellee here is withdrawing this instruction say- "In spite of the decisions raised in this case the number of witnesses testifying in behalf of the plaintiff," without pointing out any material variation, in their opinion, as worth [illegible] of witnesses. As we have before said, the [illegible] of the preliminary [illegible] testimony of the plaintiff [illegible] contradicted by the testimony of the defendant as a witness. The question

of numbers perhaps arose in the partial corroboration of the plaintiff's testimony by his son, and of the defendant's testimony by his two daughters. We do not think the question of the number of witnesses so important in this case as to require a reversal of the judgment for the error in that instruction.

We find no reversible error in the record; therefore the judgment is affirmed.

Affirmed.

of numbers perhaps arose in the partial corroboration of the plaintiff's testimony by his son, and of the defendant's testimony by his two daughters. We do not think the presence of a number of witnesses on important in this case to require a reversal of the judgment for the error in that instruction.

We find no reversible error in the record; therefore the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6455-6467

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208 I.A. 613

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV 28 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6455

6467

Agenda 39.

208 I.A. 613

Daisy Lenson, Administratrix
of Estate of Martin L. Lenson,
Deceased,
Appellee,

-vs-

Appeals from Cook.

Chicago City Railway Company,
Chicago Railways Company,
Calumet & South Chicago Railway
Company and the Southern Street
Railway Company, Corporations,
operating and doing business
under the name of the Chicago
Surface Lines, and
Consumers Company, a Corporation,
Appellants.

Mcheus, J.

This suit was brought in the circuit court of Lake County, by the appellee, Daisy Lenson, as the administratrix of the estate of her deceased husband, Martin L. Lenson, against the appellant the Consumers Company; and against the Chicago City Railway Company, Chicago Railways Company, Calumet & South Chicago Railway Company, and the Southern City Railway Company, corporations, who are operating and doing business together under the name of the Chicago Surface Lines, for damages alleged to have been sustained on account of the death of said Martin L. Lenson, which resulted from injuries received by the deceased in a street car collision in the City of Chicago.

There was a trial by jury and a verdict for $10,000.00 damages in favor of appellee and against both appellants. The

Chicago Surface Lines, and The Consumers Company. A motion for a new trial was made by each of the appellants, which was denied by the court, and thereupon judgment was rendered upon the verdict, from which judgment each of said parties separately prosecuted an appeal. These two separate appeals have been consolidated for decision in this court, and will be considered together in this opinion.

The declaration in the case to which the general issue was pleaded by both appellants alleges that the Chicago Surface Lines were possessed of and operating a certain street car in the City of Chicago in a southerly direction on Wabash Avenue, near the intersection of 13th Street; and that the appellee's intestate Martin L. Benson, was a passenger riding upon said car; and was in the exercise of all due care and caution for his own safety; that The Consumers Company was then and there possessed of a certain wagon drawn by horses, which it was driving in a northerly direction toward the street car in question; and that the Chicago Surface Lines so negligently and carelessly ran, managed and operated said street car, and the Consumers Company so negligently and carelessly drove and managed said horses and wagon that said car and one of the tongues of said wagon collided, and that in said collision the tongue was driven into said car against appellee's intestate, and that by reason thereof he was greatly injured, and subsequently died from said injuries. The negligence charged in the second count against the appellants is that in operating the street car the Chicago Surface Lines negligently and carelessly failed to keep a sufficient lookout for other vehicles upon the street, and failed to keep the street car under such control that it could be readily stopped; and that the Con-

sumers Company negligently and carelessly drove into the path of said street car without regard to the presence of said street car, so that by reason of the several negligent and careless acts and omissions of said parties the wagon collided with said street car and injured appellee's intestate, from which injuries he subsequently died.

Each of the appellants respectively contend on this appeal that the verdict is manifestly against the preponderance of the evidence; and that it does not sustain the charge of negligence; that the court erred in its rulings in instructions on the admission of evidence, and that there is error in instructions to the jury. It is also claimed that the damages are excessive.

The proof shows that the Chicago Surface Lines are operating a double track street car line on Wabash Avenue running north and south; that the street cars north bound run on the east track, and the south bound street cars on the west track; and that on the day of the accident, namely, February 11, 1916, about 6:30 P.M. the appellee's intestate, Benron, was a passenger on a south bound street car; and riding in the front vestibule seated on the east side of the car between two other passengers; and that while thus seated in the car near the intersection of 13th Street, the car collided with a heavy loaded coal wagon of the Consumers Company, drawn by three horses; and in consequence of the collision one of the tongues of the wagon penetrated the dash board of the street car and struck Benron in the abdomen, and ther by causing injuries from which he afterwards died. Each of the appellants disclaim responsibility for the collision, and apparently sought on the trial to put the blame on the other.

The testimony of the principals in the collision, namely, the street car motorman and the driver of the Commmers Company's wagon, is sharply conflicting. The motorman, who was operating the street car, testified to the effect that just before the collision he had stopped at 13th Street about 400 feet from the place of the accident, to take on passengers, and then ran the car toward 13th Street, gradually speeding up his car, but at no time exceeding a speed of six or seven miles per hour; that he kept a proper lookout, and that the track at that time was clear of obstructions; that as he approached the intersection of 13th Street and about 150 feet north of the intersection, the horses and wagon of the Commmers Company, which had been traveling behind a north bound car, suddenly emerged from behind the car toward the approaching street car, partially occupying the track on which the car was approaching; and that the driver then turned the horses and the tongue toward the east track, and was in that position when the collision took place; that when the horses and wagon suddenly came from behind the north bound car the street car which he was operating and which was then running at the rate of six or seven miles per hour, was distant only about fifty feet from the wagon; that as soon as he saw the team and wagon turn into the south bound track he immediately applied the brakes and appliances for stopping the car; but wasn't able to stop the car in time to avoid a collision. The testimony of the driver of the Commmers Company's wagon is to the effect that he was driving north on the north bound street car track from 18th Street; and that a north bound car came up behind him and rang its gong to get him to move out of the way so it could pass by; that in consequence of the warnings he had received when he got near the intersection of 13th Street he drove into the south bound track and drove north thereon expecting to turn back into the north

bound track as soon as the car that gave him the warning had passed; that when he drove onto the south bound track he noticed that the car with which he afterwards collided was at 18th Street, and that he saw ahead of the car another Consumers Company's wagon driving south on the same track and also an automobile; that these vehicles were between him and the street car when he got on the south bound track, but that they passed over to the west side of the street and were off of the track when the car was still about 200 feet away; that he stopped his wagon and turned his horses toward the east or north bound track, but was unable to get back on that track because there was another north bound car immediately following the one which he had allowed to pass, in the way; and while in that position and before the second car had got out of the way, the street car ran against his team and the wagon tongue.

A number of witnesses was called by each of the appellants respectively to corroborate the testimony given by the motorman and by the driver of the wagon, and some of the testimony of these witnesses is corroborative of the one and some of it corroborative of the other. Each of the appellants insist, that under the evidence both cannot be held to be guilty; that if one be found guilty necessarily the other would have to be found not guilty.

We are of opinion, however, that the jury were fully warranted in finding from the evidence that both of the parties were guilty of negligence and that the collision was due to the concurrent negligence of both, as charged in the declaration; that the driver of the Consumers Company's wagon was guilty of negligence in driving on the south bound track in the way of this approaching car, which he saw and knew was coming; and that the motorman saw the wagon standing on the track in the way of his car in sufficient time to have stopped the car and avoided the collision.

It is contended by the appellant, Chicago Surface Lines, that there was error in giving to the jury certain instructions which were requested by the appellant, The Consumers Company; that instruction 12 was erroneous because it told the jury that the mere happening of the accident in question was not of itself evidence of negligence on the part of the Consumers Company; that instruction 13, which contained a definition of ordinary care, was deficient in not embodying in the definition the matter of time when such ordinary care should be exercised; and it is claimed that in instruction 14 the court gave to the jury an erroneous definition of proximate cause.

We are of opinion, however, that these instructions were not subject to the criticisms made, and that there was no error in giving them to the jury.

It is also contended that instruction 15 was erroneous because it had a tendency to mislead the jury in the determination of the question whether or not reasonable care was exercised by the Consumers Company's driver, in turning on to the south bound street car track. We do not so regard the instruction. The statement in the instruction is to this effect: that the Consumers Company had the right to drive upon the tracks if in driving upon the same the driver was in the exercise of ordinary care for the safety of the person and property of others, which we deem a correct statement of the law involved. It is contended that instruction 17 is erroneous. This instruction is to the effect that the mere driving by the Consumers Company of its horses and wagon northward in the south

bound tracks of the street car company on Wabash Avenue was not negligence as a matter of law, but that the question of negligence involved, under these circumstances, was one of fact for the jury to decide from all the evidence in the case. We find no error in this statement of the law. Nor is there any conflict between instruction 17 and instruction 15 given at the request of appellant, the Chicago Surface Lines, which tells the jury that if they believe from the evidence as a matter of fact that the driver of the Consumers Company's horses and wagon violated the city ordinance by driving on the south bound track, and that such violation of the city ordinance was the sole proximate cause of the injury in question that the violation of the ordinance was prima facie negligence.

The Chicago Surface Lines contend that there is also error in some of the instructions given for the appellee and that instruction 9 erroneously tells the jury that they are the sole judges of questions of fact. While this instruction does tell the jury that they are the sole judges of the questions of fact involved in the case, it also tells them in connection therewith that they are to adjudge the questions of fact under the instructions of the court, and from the evidence in the case, and the instruction is therefore not subject to the criticisms made in the cases cited by the appellant, but by the qualifications indicated states the law concerning the province of the jury with substantial correctness. An objection is made to instruction 10 with reference to the matter of the preponderance of the evidence bearing upon the issues in the case; but the objection has no merit inasmuch as it has been repeatedly held that it is not error to give this instruction in cases of this kind; nor does it contain any assumption specially prejudicial to the Chicago Surface Lines. The Chicago Surface

Lines also insist that Instruction 11 impliedly authorizes a recovery against it for a breach of duty not charged in the declaration. We do not approve the instruction, and are of opinion that it will not bear the construction suggested. The instruction merely purports to state the duty of the appellant with reference to the care which the street car company was bound to exercise towards the plaintiff's intestate in the operation of its street car in which he was riding as a passenger, and correctly states the law on that point.

It is urged by the appellant, The Consumers Company, for reversal of the judgment that the proof of the ordinance of the City of Chicago providing that an overtaken vehicle on the streets should turn to the right, and that when requested to do so any driver or person having possession or control of a vehicle traveling upon such street should turn to the right as soon as practicable so as to allow an over-taking vehicle free passage to the left of the overtaken vehicle, was erroneous; and that it was also error to allow the examination of the Consumers Company's driver concerning his knowledge of the ordinance mentioned. This proof was offered as a part of the defense of the Chicago Surface Lines; and The Consumers Company made no objection to the introduction of the evidence on the trial, and not having objected to it at that time it is not in position to raise any questions of error concerning its admission on appeal.

The Consumers Company also contends that the court erred in the giving of instructions 25 and 26, which were given to the jury by the court at the instance of the Chicago Surface Lines. Instruction 26 makes the point that a street railway company is vested with a superior right of way over other vehicles concerning

that portion of the street occupied by its tracks, at points other than street intersections. The matter of the relative rights of the street car company and the Consumers Company as between themselves in the use of that portion of the street where the accident occurred did not enter materially into the question of the care which was due the plaintiff from the driver of the Consumers Company's wagon. If the Consumers Company's driver was negligent in getting on the south bound track and in the way of the approaching street car, he would be negligent whether the street car company had or had not a superior right to run along the track in question. The instruction therefore could not have had any material effect upon the real issue presented for the determination of the jury, which was between the appellee and the Consumers Company on the question of the negligence charged in the declaration. Instruction 25, which has heretofore been referred to, presents the version of the case contended for by the Chicago Surface Lines, and was given at their instance. It does not present the version of the case upon which the appellee claimed the right to recover, either under the allegations of her declaration or the proofs offered in support thereof. If there is error in the instruction in question it is an error committed at the instance of the co-defendant of the Consumers Company, and such error, under the circumstances here presented, does not militate against appellee's right of recovery, and it is not a reversible error. Schmidt v. Chicago City Railway Co., 239 Ill. 494; Conlon v. Chicago Railways Company, 181 Ill. App. 50; Cummins v. Sanitary District of Chicago, 189 Ill. App. 639.

The Chicago Surface Lines also insist that the court erred in allowing proof that the plaintiff's intestate taught his children obedience and courtesy, and to be industrious; and that he

taught them the Lord's prayer. Proof of this character, however, is competent on the question of damages. Goddard v Insler, [illegible] Ill. 46[illegible]; 1[illegible] Ill. App. 1[illegible].

Appellants' contention that the damages are excessive, is also without merit. The plaintiff's intestate at the time of his death was about thirty-five years of age, in good health, and a man of industrious and frugal habits; he was earning at his regular occupation of elevator operator about $7[illegible] per month, and in addition thereto was earning extra money by doing odd jobs of plumbing after the hours of his regular employment. He devoted his earnings to the support and maintainance of his wife and two children and to make payment for a home which he had purchased. He also looked after the education of his children, not only by giving them proper schooling, but in giving them a proper religious and moral training.

The rule for measuring damages in a case of this kind was well defined in O'Fallon Coal Co., v.Laquet, 19[illegible] Ill. 1[illegible], in which the court says that the damages may be allowed which are sufficient to fully compensate for the pecuniary loss, which the deceased's wife and children have sustained in consequence of his death, and in such a sum as the deceased would probably have earned by his intellectual or bodily labor at his business, profession or trade, during the residue of his probable life, and which would have gone for the benefit of his wife and children, and that in estimating this the deceased's age, business capacity, ability and disposition to labor, and his habits of living are to be considered; and in addition thereto the value of a father's services in his attention to and supervisionence of his children and family and in their education, of which they are deprived by his death, may also be considered as an

element of pecuniary damage. Practically all the elements which could be considered by a jury in allowing damages were present in this case; but on the ground alone of the loss of the benefit of the earnings of the deceased during the probable period of his life, the amount of damages fixed by the jury cannot be regarded as excessive. C. N. W. Ry. Co., v. Jackson, 55 Ill. 492; I. C. R. R. Co., v. Harris, 62 Ill. App. 172.

We find no reversible error in this case, and the judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 628

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on FEB 12 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6400. Agenda No. 1.

208 I.A. 628

W. C. Foster,
Plaintiff in Error,
-vs-
Error to Boone.

C. M. Church, County Treasurer, William Bowley, County Clerk,
Defendants in Error.

Carnes, P. J.

Plaintiff in error, W. C. Foster, through his agent, Cannell, at a tax sale in Boone county purchased property there sold on a judgment of the county court based on a special assessment for the improvement of West Lincoln avenue from State street to the city limits of Belvidere, which property was described in the judgment as- " Right of way, tracks and franchise of Belvidere City Railway Company, its successors, assigns," and in the delinquent tax list notice published- "Belvidere City Railway Co. right of way, tracks, etc. for $327.70." He filed his petition for a writ of mandamus to compel the county clerk to make an entry opposite the description of the property that the same was erroneously sold, and the county treasurer to refund on demand the amount paid for the certificate of sale, relying on section 213 of our Revenue act (J.& A. ~~par.~~ ¶ 9432), which provides for such entry and refund where the description of land sold is void for uncertainty. The defendants filed a demurrer, which the court sustained, and dismissed the petition. Defendants say in closing their brief and argument here that the sole issue to be determined is- "Was the description a compliance with the

Gen. No. 6420. Docket No. 1.

208 I.A. 628

W. C. Porter,
Plaintiff in Error,

-vs-

Error to Boone.

J. M. Murphy, County
Treasurer, Million
Bowlby, County Clerk,
Defendants in Error.

Barnes, J. D.

Plaintiff in error, W. C. Porter, through his agent, Hammell, at a tax sale in Boone county purchased property there sold on a judgment of the county court based on a special assessment for the improvement of West Lincoln avenue from State street to the city limits of Belvidere, which property was described in the judgment as- " Right of way, tracks and franchise of Belvidere City Railway Company, its successors, assigns," and in the delinquent tax list notice published- "Delinquent city railway co. right of way, tracks, etc. for 1897.VO." He filed his petition for a writ of mandamus to compel the county clerk to make an entry opposite the description of the property that the same was erroneously sold, and the county treasurer to refund to him the amount paid for the certificate of sale, relying on section 213 of our Revenue Act (1.A.A. [illegible]), which provides for such entry and refund where the description of land sold is void for uncertainty. The defendants filed a demurrer, which the court sustained, and dismissed the petition. Plaintiff may in closing their brief and argument have that its sale ought to be determined in- [illegible]

statute"? And the plaintiff in error begins his statement of the case by saying it is the ultimate question for our determination. We therefore, disregarding allegations in the petition that the agent purchasing for plaintiff in error was not authorized to do so- which we presume are immaterial- and assume that defect, if it is a defect, was not reached by the demurrer filed, we consider the description as set out in the petition, disregarding statements in defendants in error's brief of facts not disclosed in the pleadings. Defendants in error cite and rely upon section 40 of the Local Improvement act (J.& A. 1430) providing that in levying special assessments each lot, block, tract or parcel of land shall be assessed separately in the same manner as upon assessment for general taxation except the property of railroad companies or the right of way and franchise of street railway companies, which may be described in any manner sufficient to reasonably identify the property intended to be assessed, and insist that under the holding in City of Nokomis v.Zepp, 246 Ill. 159,163, the description here in question was sufficient. In that case the court held that because of the provision of section 40 a description reading-"Cleveland, Cincinnati, Chicago and St. Louis Railway Company's right of way on Maple, Spruce, Pine and Cedar streets, $3031.06" was sufficient to reasonably identify the property intended to be assessed in a special assessment levied to pay for curbing, grading and paving said streets. This holding was on a question of confirming the assessment, and we presume there was in the record before the court sufficient data to locate the streets named in the city levying the assessment, and the property sought to be assessed was by

absolutely. And the plaintiff in error begins his statement of the case by saying it is the ultimate question for our determination. We therefore, disregarding allegations in the petition that the agent purchasing for plaintiff in error was not authorized to do so, which as pleaded are immaterial, [illegible] that defect, if it is a defect, was not raised by the demurrer filed, we consider the description as set out in the petition, disregarding statements in defendants in error's brief of facts not disclosed in the pleadings. [illegible] in error cite and rely upon section 60 of the Local Improvement Act (4.2 S. 1820) providing that in levying an assessment against each lot, block, block or parcel of land shall be assessed separately in the same manner as upon assessment for general taxation except the property of religious societies or the right of way and tracks of street railway companies, which may be described in any manner sufficient to reasonably identify the property intended to be assessed, and cases that cite the holding in City of Pueblo v. Gray, 5 Colo. App. 1. In, the description here in question was sufficient. In that case the court held that because of the provision of section 64 a description reading "Fairview, Highland, Tabor and Denver Railway Company's right of way on Eighth, Curtis, Ninth and Cedar streets, 2000.00" was sufficient to reasonably identify the property intended to be assessed in a special assessment levied to pay for sewers, grading and paving said streets. This holding was on a question of sufficiency of the assessment, and we presume there is in the record before the court sufficient data to locate the streets named in the city levying the assessment, and the property subject to be assessed was by

its description located on three streets named, while in the present case the whole right of way, tracks and franchise of the railway company, wherever situated, is made subject to sale.

In The People v.C.B.& Q.R.R.Co., 256 Ill. 352, it was held that on application for judgment and order of sale the description- " Chicago, Burlington & Quincy Railroad Company- Railroad tracks composed of the right of way, main track, second main track and turn-out, and the stations and improvements of said railway company on such right of way" was insufficient to give the court jurisdiction to enter a judgment, even though the railroad company appeared and filed objections to the merits of the taxes, because the description would not enable a competent surveyor to locate the property; that the description was of such an indefinite character that it might be held to include railroad track not within the jurisdiction of the taxing body, or might include two or more lines of railroad right of way belonging to the appellant within the county, only one of which was located within the jurisdiction of the taxing body making the tax levy sought to be enforced; that the defect might have been cured by amendment but was not so cured; therefore the county court was without jurisdiction to render judgment against the lands.

In Town of Cicero v.C.B.& Q.R.R.Co., 270 Ill. 606, the court said, citing authorities,- " It is essential to the validity of a special assessment that the land assessed can be found and located", and held a description reading,- "that part N.of C.B.& Q.R.R, in S.W.¼ S.28,T.39,R.13", too ambiguous to support a judgment. The court referred to said section

the description located on three streets named, while in the present case the whole right of way, tracks and facilities of the railway company, wherever situated, is made subject to sale.

In The People v. C.B.& Q.R.R. Co., 254 Ill. 587, it was held that on application for judgment and order of sale the description- " Chicago, Burlington & Quincy Railroad Company- Railroad tracks composed of the right of way, main track, branch main track and turn-out, and the stations and improvements of said railway company on such right of way" was insufficient to give the court jurisdiction to enter a judgment, even though the railroad company appeared and filed objections to the sale of the taxes, because the description could not result in a competent surveyor to locate the property; that the description was of such an indefinite character that it might be held to include railroad track not at in the jurisdiction of the taxing body, or might include two or more lines of railroad right of way belonging to the company within the county, only one of which was located within the jurisdiction of the taxing body making the tax levy sought to be enforced; that the defect might have been cured by amendment but was not so cured; therefore the county court was without jurisdiction to enter judgment against the lands.

In Town of Ivanhoe v. C.B.& Q.R.R. Co., 270 Ill. 604, the court said, citing authorities.- " It is essential to the validity of a special assessment that the tax assessed can be found and located", and held a description :- "that part N. of C.B.& Q.R.R. in S.4.; S.E.4.S.E.4.S.E.4." was indefinite to support a judgment. The court referred to such sections

40 of the Local Improvement act and said the question still is "whether the description was sufficient to reasonably identify the property intended to be assessed." It is not here contended that the description is sufficient if it does not reasonably identify the property intended to be assessed, but said it should be read as describing the property of the railway company located on the street to be improved, and that it does not appear that the company owned property of that description on any other street; and even if it did the question whether it was contiguous or was benefited could not be raised in this proceeding. We do not see how a court can take judicial notice that the company did not own right of way, tracks, etc., at various places outside of the city of Belvidere. The description literally covered all property of that description wherever situated that the company might own. We conclude it was void for uncertainty, and the county clerk and county treasurer were required by said section 213 of the Revenue act to proceed in the manner there pointed out in cases of such void descriptions.

The judgment is reversed and the cause remanded with directions to the court to overrule the demurrer.

Reversed and Remanded.

40 of the local improvement act and said the question still is "whether the description was sufficiently reasonably identify the property intended to be assessed." It is not here contended that the description is sufficient if it does not reasonably identify the property intended to be assessed, but said it should be read as describing the property of the railway company located on the street to be improved, and that it does not appear that the company owned property at that intersection on any other street; and even if it did the question whether it was contiguous or was benefited could not be raised in this proceeding. We do not see how a court can take judicial notice that the company did not own right of way, tracks, etc., at various places outside of the city of Saginaw. The description literally covered all property of that description wherever situated that the company might own. We consider it was sufficiently certainty, and the assessment roll and property were required by said section 241 of the charter not to proceed in the manner there pointed out in case of such descriptions.

The judgment is reversed and the cause remanded with directions to the court to overrule the demurrer.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

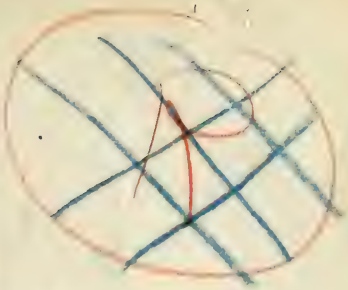
I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

3623



208 I.A. 630

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on FEB 12 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

208 I.A. 630

Gen. No. 6469. Ag. No. 30.

James C. Shreffler,
Appellee,
-vs-
Appeal from Kankakee.
Cora Fuller,
Appellant.

Carnes, P. J.

Appellee, James C. Shreffler, sued appellant, Cora Fuller, in assumpsit on a claim for labor in clearing some wood land and working the logs into lumber. He filed with his declaration a bill of particulars of thirteen items aggregating $925.37, crediting payments of $46.50, leaving a balance claimed of $878.87. Appellant filed the general issue and claimed that the work in question was done under two separate contracts, the second made not with appellee but with his son; that the contract of appellee had been fully paid and that he had used her lumber, for which he should account, in building shacks on the premises, and that she was entitled to recoup damages because of improper work. There was a verdict for the plaintiff ofor $475.00, on which the court, after overruling appellant's motion for a new trial, entered judgment for $486.95, which included interest after the date of the verdict.

It is urged that the evidence does not support the verdict. The testimony covers seven hundred fifty-nine pages of the record, which appellant has attempted to present here in fifty-one pages of her abstract, a careful reading of which does not enable us to reach any satisfactory conclusion as to what the evidence was on the principal controverted facts. Appellee has

Gen. No. 6469. Sp. No. 24.

James G. Merritt,
Appellant,
-vs-
Jere Miller,
Appellant.

Appeal from Sandusky.

Carter, J. i.

Appellee, James G. Merritt, sued appellant, Jere Miller, in assumpsit on a claim for labor in clearing some wood land and erecting the logs into lumber. He filed with his declaration a bill of particulars of 3 items aggregating $[illegible].37, crediting payments of $46.30, leaving a balance claimed of $[illegible].07. Appellant filed the general issue and claimed that the work in question was done under the separate contracts, the second made not with appellee but with his son; that the material of appellee had been fully paid for; that he was not liable for lumber, for which he should account. In building blocks on the premises, and that she was entitled to credit for certain damages because of improper work. There was a verdict for the plaintiff for $[illegible], on which the court, after overruling appellant's motion for a new trial, entered judgment for $[illegible], with interest from date of the verdict.

It is urged that the evidence does not support the verdict. The testimony covers seven hundred fifty-odd pages of the record, which appellant has attempted to present here in fifty-one pages of her abstract, a material reading of which does not enable us to reach any satisfactory conclusion as to what evidence was on the principal controverted facts. Appellee has

filed an additional abstract of six pages mainly devoted to quotations from parts of the record. While this shows incorrect statements of some items of evidence in appellant's abstract, still, because of insufficient abstracts we cannot determine the question of the weight of the evidence without reading the record. It was the duty of appellant to file an abstract showing the matters on which she relied for a reversal of the judgment. Appellee had the right to file an additional abstract but was under no duty to make it full and complete. It is familiar law that a reviewing court will not examine the record to find grounds for reversing, but may do so to find reasons for affirming a judgment. We conclude that appellant has not shown that the evidence does not support the verdict.

There was evidence supporting appellee's claim that the entire work was done under a contract with him. His son Will testified to that effect; therefore appellant is in no danger of a suit by the son to recover for the same work.

Appellant argues that the court erred in ruling on the pleadings, but that point is not included in her assignment of errors. It is assigned for error that the declaration does not support the judgment, but the motion for a new trial was in writing setting out the points relied on and contains no reference whatever to the pleadings. It is claimed the court erred in denying defendants a continuance in the middle of the trial, which was asked solely on the ground that the plaintiff filed special counts at that time. Those special counts did not enlarge the bill of particulars, which was the limit on what the plaintiff could recover. There is nothing in the additional

filed an additional abstract of its case which contained questions from parts of the record. While this abstract incorporated statements of some items of evidence in appellant's abstract, still, because of insufficient abstracts we cannot determine the question of the weight of the evidence without reading the record. It was the duty of appellant to file an abstract showing the matters on which she relies for a reversal of the judgment. Appellee had the right to file an additional abstract but was under no duty to make it full and complete. It is familiar law that a reviewing court will not consider the record to find grounds for reversing, but may do so to find grounds for affirming a judgment. We conclude that the record shows that the evidence does not support the verdict.

There was evidence supporting appellee's claim that the entire work was done under a contract with him. His son will testified to that effect; therefore appellant is in no danger of a suit by the son to recover for the same work.

Appellant argues that the court erred in ruling on the pleadings, but that point is not material in our conclusion of error. It is contended by appellee that the judgment does not support the pleadings, but the opinion for a new trial was in writing setting out the points which the court relied on in reference whatever to the pleadings. It is unless the court erred in denying elements a continuance in the course of the trial, which was argued solely on the ground that the intended filed special counts at that time. Under special counts, it did not appear the bill of particulars, which was a limit on what the plaintiff could recover. There is nothing in the additional

counts that should have surprised the defendant or that required a continuance. It is argued that the court erred in admitting certain testimony for the plaintiff. As to some of it appellant's abstract makes it appear that no objection was made to the question until after it was answered and then the court excluded the answer. Testimony was introduced as to the amount of lumber, and a witness permitted to testify for the plaintiff to the result of a measurement that he evidently only knew as he was told by the party measuring it in his presence. This evidence was incompetent but not harmful because there was other competent uncontradicted evidence xx of the same measurement. Complaint is made that the court refused instructions tendered by appellant without noticing the fact that the instructions were slightly modified and given. we see no error in such modifications.

The plaintiff offered his bill of particulars in evidence, which the abstract shows was objected to as improper, incompetent and self-serving. The record shows the further statement of appellant's counsel that it ought not to go to the jury any more than a deposition should go. It appears in the record, omitted from the abstract, that this bill of particulars was prefaced by the words, "This action is brought to recover", and closed with the words, "The above are the particulars of the plaintiff's demand in said action". While it was error to admit it in evidence, it was properly sent to the jury room as part of the pleadings to be used by them in considering and discussing the items of the plaintiff's claim. We think there is no reason to suppose it was considered or used by the jury as substantive evidence in the case and therefore its formal

counts that would have surprised the draftsmen of that regular a continuance. It is argued that the court erred in admitting certain testimony for the plaintiff. As to some of it defendant's abstract makes it appear that no objection was made to the question until after it was answered and then the court sustained the answer. Testimony was introduced as to the amount of lumber, and a witness permitted to testify for the plaintiff to the result of a measurement that he evidently only knew as he was told by the party measuring it in his presence. This evidence was immaterial but not harmful because there was other competent admissible evidence as of the same measurement. Complaint is made that the court refused instructions tendered by appellant without noticing the fact that the instructions were slightly modified and given. We see no error in such modifications.

The plaintiff offered in bill of particulars in evidence, which the defendant stoutly was objected to as improper, incompetent and self-serving. The court sustained the instruction of appellant's counsel that it might not be so to the jury any more than a document should go. It appears in the record, omitted from the abstract, that this bill of particulars was preceded by the words, "It is asked to prove" and closed with the words, "The above are the particulars of the plaintiff's demand in this action." While it was error to admit it in evidence, it was properly read to the jury because part of the pleadings to be used by them in considering and discussing the issues of the pleadings. We think there is no reason to reverse it on a technical or that by the jury as substantive evidence in the case but overwhelming.

admission in evidence should not be held reversible error.

Appellant presented thirty-three special interrogatories to be answered by the jury and returned with their general verdict. The court refused all of them. Two items in the bill of particulars were withdrawn and on each of the remaining eleven two interrogatories were framed requiring the jury to answer if they found anything due the plaintiff under that item, and if so, how much. They were then asked by interrogatories twenty-three and twenty-four if they found the defendant entitled to any sum by way of recoupment for damages she may have sustained by reason of the failure of the plaintiff to perform his contract, and if so, how much? By interrogatories twenty-five and twenty-six if they found the defendant entitled to any credit for payments, and if so, how much? By twenty-seven if the plaintiff authorized the defendant to build shacks that had been testified about in the case. By number twenty-eight if the defendant agreed to pay for the lumber used in said shacks. Interrogatories twenty-nine and thirty asked if there was any sum due the plaintiff from the defendant under the first contract, and if so, how much? Thirty-one and thirty-two if there was any sum due under the second contract, and if so, how much? And interrogatory thirty-three, which was not presented until after the argument to the jury, and for that reason alone properly refused, asked whether the second contract was entered into with the plaintiff, or his son Will. Apparently appellant was endeavoring to get such a finding of facts as is required in case of a special verdict at common law, also authorized by section seventy-nine of our Practice act if the

admission in evidence should not be held reversible error.

Appellant presented thirty-three special interrogatories to be answered by the jury and returnes with their general verdict. The court refused all of them. Two items in the bill of exceptions were withdrawn and on each of the remaining eleven the interrogatories were framed requiring the jury to answer if they found anything due the plaintiff under that item, and if so, how much. They were then asked by interrogatories twenty-three and twenty-four if they found the defendant entitled to any credit by way of recoupment for damages she may have sustained by reason of the failure of the plaintiff to perform his contract, and if so, how much? By interrogatories twenty-five and twenty-six if they found the defendant entitled to any credit for payments, and if so, how much? By twenty-seven if the plaintiff authorized the defendant to build sheds that had been installed about in the case. By number twenty-eight if the defendant agreed to pay for the lumber used in said sheds. Interrogatories twenty-nine and thirty asked if there was any mutual mistake between the plaintiff and the defendant under the first contract, and if so, how much? Thirty-one and thirty-two if there was any fraud on the part of the second contract, and if so, how much? The interrogatory thirty-three, which was not presented until after the argument to the jury, and for that reason alone properly refused, asks whether the second contract was entered into with the plaintiff, or in her name. Apparently appellant was endeavoring to get such a finding as is required in case of a mutual mistake, but the evidence, supported by section seventy-nine of our Practice Act, is

jury wish to return a special verdict. The question whether these interrogatories, or some of them, were proper in case of a special verdict is not presented and need not be discussed. The inquiry here is whether appellant was deprived of any right under the second clause of said section seventy-nine to have the jury, along with their general verdict, find specially upon questions of fact. That statute was first construed by the supreme court in C.& N.W.Ry. Co. v.Dunleavy, 129 Ill. 132, where its effect and the proper practice under it was so fully and clearly stated that little was left for further decision. It is there said- page 143, et seq.- that a special finding under this clause of the statute is not a special verdict but an essentially different proceding; that questions so submitted should be restricted to those ultimate facts upon which the rights of the parties directly depend; that the jury should not be required to find mere matters of evidence; that the fact to be submitted should be one which, if found, may in its nature be controlling; that verdicts must be the unanimous judgment of the twelve jurors; upon all matters which they are required to find they must be agreed, but they need not reach their conclusions in the same way or by the same method of reasoning; to require unanimity in the mode by which those conclusions are arrived at would in most cases involve an impossibility; to require unanimity in each of the successive steps leading to the result would be practically destructive of the entire system of jury trials; that the jury cannot be required to give their views upon each item of evidence and thus practically be subjected to a cross examination as to the entire case. In Elgin City Railway Co.,v.Salisbury, 60 Ill. App. 173, this court held interrogatories properly refused because

jury wish to return a special verdict. The question whether these interrogatories, or some of them, were proper in case of a special verdict is not presented and need not be discussed.

The inquiry here is whether appellant was deprived of any right under the second clause of said section seventy-nine to have the jury, also, with their general verdict, find specially upon questions of fact. That statute was first construed by the supreme court in C.& N.W.Ry. Co. v. Dunleavy, 129 Ill. 132, where its effect and the proper practice under it was so fully and clearly stated that little was left for further discussion. It is there said- page 143, et seq.- that a special finding under the clause of the statute is not a special verdict and is essentially different proceeding; that questions to submitted should be restricted to those ultimate facts upon which the rights of the parties directly depend; that the jury should not be required to find mere matters of evidence; that it must be a finding which would be one which, if found, may in the mind of a reasonable; that verdicts must be the unanimous judgment of the twelve jurors; upon all matters which they are required to find they must be agreed, but they need not reach their conclusions in the same way or by the same method of reasoning; to require unanimity in the mode by which those conclusions are reached as well as in fact would involve an impossibility; to require unanimity in each of the successive steps leading to the result would be practically destructive of the active system of jury trials; that the jury cannot be required to give their views upon such like of evidence and this practically is analogous to cross examinations as to the entire case. In Chgo. City Railway Co. v. Kinney, 63 Ill. App. 173, this court held interrogatories properly refused because

the fact found in response to either would not be a controlling one in the case. The supreme court in the same case on appeal- 162 Ill. 187- set out the interrogatories, one of which was whether there was any apparent cause for the accident at the time and place, etc., and if so, what? and said it was properly refused because it could not aid the court in determining what judgment to enter, but a further finding of fact would be necessary before any conclusion of law could be drawn from its answer, and said on page 192- " We do not think it was the intention of the legislature to put it in the power of either party to require the jury in answer to a general quetion of this character to summarize and state the facts constituting the supposed cause of action and thus to render a special instead of a general verdict." A jury cannot be required to, in effect, state the evidence upon which they find their verdict. Judy v.Sterrett, 153 Ill. 93; North Shore St.Ry.Co., v.Payne, 192 Ill. 239. The use of special interrogatories is not permitted for the mere purpose of enabling a party to see the basis for a general verdict and learn what the jury thought about various matters of evidence. Firemen's Ins.Co., v.Appleton Paper Co., 161 Ill. 9. The court in Smith v.Sanitary District, 260 Ill. 453,463, on a question of damages by overflow of water on 435 acres of land divided into several tracts not adjoining, held interrogatories directed to the injury to its several tracts separately properly refused on the ground that the plaintiff's cause of action was single and the defendant could not split it up and compel a finding according to government subdivisions or other artificial or natural divisions of the land, and said, citing authorities,- " A special interrogatory is not proper unless some answer responsive thereto would be

the fact found in response to either will not be a controlling one in the case. The supreme court in the same case on appeal- [illegible] 127- set out the interrogatories, one of which was whether there was any apparent cause for the incident at the time and place, etc., and if so, what. And said it was properly re- fused because it could not be sent in determining proper- ment to enter, but a further finding of fact would be necessary before any conclusion of law could be drawn from the answer, and said on page 130- " We do not think it was the intention of the legislature to put it in the power of either party to require the jury in answer to a general question of this character to answer- ing and state the fact constituting the proximal cause of action and thus to render a special verdict of a general verdict." The jury cannot be required to, in effect, state the evidence upon which they find their verdict. Judy v.Stewart, 102 Ill. 54; North Shore St.Ry.Co., v.Thrpe, 128 Ill. 602. The use of special interrogatories is not permitted for the mere purpose of enabling a party to use the facts for a general verdict and learn what the jury thought their verdict was. Firemen's Ins.Co., v.Chicago Fire Co., 121 Ill. 9. The court in Smith v.Chicago Ry.Co., 206 Ill. 1, 18, on a question of damages by overflow of water on the 21st day of June, 1896, several trots not a point, but interrogatories include the injury to its several tracts respectively. The court the ground that the plaintiff's cause of action was single and defendant could not split it up and compel a finding as to government subdivisions or other artificial or natural divisions of the land, but said, citing authorities,- " A special interro- gatory is not proper unless an answer thereto would

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inconsistent with some general verdict that might be returned upon "the issues in the case." It seems to be the opinion of the court that interrogatories going only to the amount of damages should for thar reason be refused. It is said on page 464- " The interrogatories do not refer to any facts determinative of the rights of the parties, or any issues in the case. The answers to them could only affect the amount of the damages and have no application to the cause of action or any element of it except the amount of damages."

In the present case the interrogatories considered as a whole were properly refused because there was a general verdict and the defendant was not entitled to a complete finding of facts as the basis for a special verdict. We are also of the opinion that she was not entitled to a special finding on any of the several items, which was the basis of the plaintiff's demand and the defendant's defense. No answer to interrogatories directed to any one item would have controlled the verdict. The jury found for appellee about one half of his demand. In any case where the plaintiff's claim must rest on proof of a dozen or more controverted items it is quite usual that a jury agrees on a sum due him less than that demanded, but no one familiar with jury trials would in most cases regard it possible that twelve men should rach reach the same conclusion by the same treatment of each different item of the claim. No authority is cited and we have found none applying the provisions of this statute or of other similar statutes, to actions on accounts covering numerous controverted items. The question has usually been presented in actions of tort, but we think the trial court was

inconsistent with some general verdict that might be returned upon "the issues in the case." It seems to be the opinion of the court that interrogatories going only to the amount of damages should for that reason be stricken. It is said on p. 464- " The interrogatories do not refer to any issue arising out of the rights of the parties, or any issues in the case. The answers to them could only affect the amount of the damages. Have no application to the cause of action or any element of it except the amount of damages."

In the present case the interrogatories considered as a whole were properly refused because there was a general verdict and the defendant was not entitled to a complete finding of facts as the basis for a special verdict. We are also of the opinion that she was not entitled to a special finding on any of the several items, which was the basis of the plaintiff's demand and the defendant's defense. To answer to interrogatories directed to any one item would have controlled the verdict. The jury found for appellee about one half of her demand. In any case where the plaintiff's claim must rest on proof of a dozen or more controverted items it is quite proper that a jury decide in favor of one him less than that demanded, but no one familiar with jury trials would in most cases regard it reasonable that twelve men should reach reach the same conclusion by the same process of each different item of the claim. To authority is cited and we have found none applying as the evidence in this case or of other similar character, to actions on accounts involving numerous controverted items. The question has usually been presented in matters of fact, but as stated the trial court was

well within the principles announced in those cases when he refused to make an agreement of the jury highly improbable, if not impossible, by submitting those interrogatories for their answers.

We find no reversible error in the record; therefore the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

208 I.A. 632

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on FEB 12 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6476. Agenda No. 7.

Nels P.Nelson, Administrator with will annexed of the estate of John Lofgren, deceased,

Defendant in error,

-vs-

Error to Winnebago.

208 I.A. 632

Carolina Lofgren,

Plaintiff in error,

J.Albert Lofgren,
J.Raymond Lofgren,
Frank Lofgren,
Charles Lofgren,
Cornnal Lofgren, and
Ida Lofgren Anderson,

Defendants in error.

Carnes, P. J.

A decree was entered involving the construction of the will of John Lofgren on a bill filed by Nels P.Nelson, administrator with the will annexed, making defendants Carolina Lofgren, the widow of deceased, plaintiff in error, and the six children of deceased by a former marriage, defendants in error. It found, among other things, that said will gives and bequeaths to Carolina Lofgren the life use only of the estate. She prosecutes this writ of error claiming that under the terms of the will if the income is not sufficient for her maintenance in a comfortable manner she is entitled to a portion of the principal estate sufficient to give her a "good (though not extravagant) living." The second, fourth and fifth clauses of the will read as follows:-

"Second:- I give, devise and bequeath to my wife, Carolina Lofgren, the use of all my property, Real, Personal and Mixed, of every kind and character, wherever situate, during her natural life, if the income of my said estate shall not be sufficient for her maintenance

-i-

" in a comfortable manner, then I hereby direct that my said Executors, shall sell a portion of the real estate of which I die possessed, for the purpose of giving my said wife, Carolina Lofgren, a good (but not extravagant) living."

"Fourth:- I hereby direct, that after the demise of my said wife Carolina Lofgren, all the rest, residue and remainder, of my said Estate, shall be divided among my said children, J. Albert Lofgren, J. Raymond Lofgren, and Frank Lofgren of Pecatonica, Ill. Charles Lofgren of Rockford, Ill., Cornnal Lofgren, of North Dakota, and Ida Lofgren Anderson, of Minnesota, share and share alike. "

" Fifth:- Should my said wife Carolina Lofgren, not desire to live in the present homestead, then I hereby direct my said Executors, to sell my said Homestead, and purchase or rent a house to her liking, which said purchased house (if one shall be purchased) shall take the same course in the division of my said estate, after the demise of my said wife Carolina Lofgren, as would be the case if the present Homestead, should continue a part of my said Estate."

We are of the opinion that on the record before us she is right in her contention.

The bill was filed to procure the sale of the real estate of the deceased on the ground that it produced practically no income and the income from the personal property would not support

" in a comfortable manner, then I hereby direct that my said executors, shall sell a portion of the real estate of which I die possessed, for the purpose of giving my said wife, Caroline Lofgren, a good (but not extravagant) living."

"Fourth:- I hereby direct, that after the decease of my said wife Caroline Lofgren, all the rest, residue and remainder, of my said estate, shall be divided among my said children, 1. Albert Lofgren, 2. Swanson Lofgren, and Frank Lofgren of Jacksonville, Ill. Marries Lofgren of Bedford, Ill., Conrad Lofgren, of North Dakota, and Ida Lofgren Anderson, of Minnesota, share and share alike."

" Fifth:- Should my said wife Caroline Lofgren, not desire to live in the present homestead, then I hereby direct my said executors, to sell my said homestead, and purchase or rent a home in her lifetime, which said purchased home (if one shall be purchased) shall take the same course in the division of my said estate, after the decease of my said wife Caroline Lofgren, as would be the case if the present homestead, should continue a part of my said estate."

We are of the opinion that as the testator taken no right in her contention.

The bill was filed to promote the sale of the real estate of the deceased on the ground that it produced practically no income and the income from the personal property was not enough

the widow, with no averment that with the added income from the proceeds of the sale it would not support her. The decree ordered a sale and investment of the proceeds. The record shows that a part of the real estate was and is occupied as a homestead. The widow filed no bill or answer and was defaulted. She says in her statement of the case here that she desires a small house to be rented for her to live in , and that the real estate be sold, and out of the proceeds she be paid a reasonable living; but there was nothing in the record when the decree was entered showing her consent, that the homestead be sold. The defendants in error, other than the administrator, answered the bill and there was some oral evidence heard. Neither the answer nor that evidence is abstracted. Counsel for defendants in error say there is something in the testimony showing the condition of the property at the time the will was made bearing on the construction of the will, but do not point out where that testimony is found, and from an examination of the record we cannot learn either the condition of the estate when the will was made or its condition and value at the time the bill was filed with sufficient certainty to say whether all or a part should be sold, and what purpose the proceeds should be devoted to. An intelligent carrying out of the provisions of the will requires some knowledge of the age and condition of the widow, the value and situation of the estate, how much of it is occupied as a homestead, and whether the widow consents that the homestead be sold. It may be that a proper construction of the will requires a knowledge and consideration of the relation of the parties, and the nature and situation of the subject-matter when it was made, as suggested in Coon v.McNelly, 254 Ill. 39. It is likely that an examination of the numerous authorities

the widow, with no averment that with the added income from the proceeds of the sale it would not support her. The decree ordered a sale and investment of the proceeds. The court claims that a part of the real estate was not in controversy as a homestead. The widow filed her bill or answer and was satisfied. The says in her statement of the case here that she desires a small house to be rented for her to live in, and that the real estate is sold, and out of the proceeds she is paid a reasonable living; but there was nothing in the record when the decree was entered showing her consent that the homestead be sold. The statements in error, other than the administrator, concerning the bill, are there was some real evidence here. Neither the answer nor that evidence is abstracted. Counsel for defendants in error say there is another in the testimony showing the condition of the property at the time the bill was made, bearing on the construction of the will, but in not point out where that testimony is found, and have no knowledge of it. The record is silent learn either the condition of the estate when the will was made or its condition and value at the time the bill was filed. We find sufficient certainty in any of the other bills to a decree could be said, and what decree the probate court should be directed to. In intelligent carrying out of the provisions of the will requires some knowledge of the condition of the estate, the value and situation of the widow, her need of it is compelled to be homestead, and whether the widow consents that the homestead be sold. It may be that a proper construction of the will requires a knowledge and interpretation of the relations of the parties, and the nature and situation of the property when it was made, as suggested in some respects, the 111. It is likely that an examination of the numerous authorities

bearing on the question involved would be helpful to a court required to answer them. Each party has filed here a statement and argument, entirely omitting a brief.

We have concluded to reverse and remand the cause because of what seems to us on the present record an error in finding that the widow is not entitled to anything beyond the use of the property. This finding in another suit, if she should be compelled to bring one, might be held res judicata on that question, and while she is herself largely responsible for this unsatisfactory condition of the record, still we do not think in this chancery proceeding a decree should stand that might work hardship and injustice.

Reversed and Remanded.

bearing on the question involved could be helpful to a court required to answer them. Each party has filed here a statement and argument, entirely omitting a brief.

We have commenced to reverse and remand the cause because of what seems to us on the present record an error in finding that the widow is not entitled to anything beyond the use of the property. This finding in another suit, if she should be compelled to bring one, might be in res judicata on that question, and while she is herself largely responsible for this unsatisfactory condition of the record, yet it is not fair that in a chancery proceeding a decree should be made which might work hardship and injustice.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

208 I.A. 633

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on FEB 12 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6479. Agenda No. 64.

208 I.A. 633

John Funk,

Defendant in Error.

-vs- Error to LaSalle.

Chase Fowler,

Plaintiff in Error.

Carnes, P. J.

This is the third time this suit has been before this court. (179 Ill.App. 356; 193 Ill.App. 180.) In our last opinion the history of the litigation up to that time was stated and need not be here repeated. After re-instatement in the circuit court the cause was referred to the master in chancery to state the account in accordance with the opinion and judgment of this court. Further evidence was heard and he reported the amount due Funk from Fowler $14512.11; that the premises in controversy were of the value of $8000., and Fowler was insolvent. The chancellor heard exceptions to the report, and, after modifying some small items in the account as stated by the master and adding interest on the principal from the time of the report, entered a decree in accordance therewith finding the amount due $15118.10, and ordering payment of the indebtedness with lawful interest and costs within four months, and in case of default that Fowler be foreclosed from all equity of redemption.

Fowler prosecutes this writ of error and argues that the courterred in treating Funk as a mortgagee in possession instead of a trespasser, claiming that in the accounting the positions call for different valuations. Our former opinion contemplated

Gen. No. 6470. Grade 3a. 3b.

208 I.A. 633

John Hunt.

Defendant in Error.

-v-

Chase Powler,

Plaintiff in Error.

Error to Lamar.

Gates, J. 4.

This is the third time this suit has been before this court. (179 Ill.App. 556; 190 Ill.App. 180.) In our last opinion the history of the litigation up to that time was related and need not be here repeated. After re-instatement in the circuit court the cause was referred to the master in chancery to state the account in accordance with the opinion and judgment of this court. Further evidence was taken and he reported the sum due the bank from Powler ($4211.11); that the premiums in controversy were of the value of $800.00, and Powler was insolvent. The chancellor heard exceptions to the report, and, after allowing some small items in the account as stated by the master and adding interest on the principal from the time of his report, entered a decree in accordance therewith finding the amount due ($4213.13), and directing payment of the indebtedness with interest, costs and a sale of his interest, and in case of default, that Powler be foreclosed from all claims to redemption.

Powler presents this writ of error and argues that the contract in treating Hunter's mortgage in question as much of a transfer, claiming that in the entering the decree failed for different reasons. The lower court completed

an accounting by Funk as a mortgagee in possession and not as a trespasser. He also objects that the question of his attorney's fees was not re-opened and re-considered. That was expressly foreclosed in our last opinion which was binding on the circuit court and on this court upon this appeal. (O'Connor v.O'Connor, 163 Ill. 436 and earlier cases there cited.) There is a controversy whether a $600. note signed by both was and is the debt of Funk or Fowler. We agree with the master and the chancellor that the proof shows it to be the debt of Fowler, and that it was properly chargeable to him in this accounting, notwithstanding it is claimed that it had been included in a former settlement.

The premises in controversy are about one hundred forty acres of farm land, which the evidence shows worth $8000. Plaintiff in error does not controvert this valuation except to say that in the original bill its value was stated at $10,000. The master allowed as its rental value $350. a year. Plaintiff in error undertook to show that it had a special value to him of $1400. a year as a dairy farm. ~~Thus~~ The master fixed the rent as high as the evidence of market value warranted. We do not think the evidence showed it had any greater value to the plaintiff in error because of a special use; therefore the decree was right in that respect, and we need not enter into a discussion of the law which does sometimes under some circumstances require the market value of an article to be disregarded and a special value substituted in stating an account.

It is objected that the master erred in the rule adopted in the computation of interest and said the account should have

an accounting by Hunt as a mortgagee in possession and not as a trespasser. He also points out that the question of the attorney's fees was not re-opened and re-considered. That was strongly foreclosed in our last opinion which was binding on the appellate court and on this court upon this appeal. (O'Connor v. O'Connor, 102 Ill. 436, and earlier cases there cited.) There is a re-trovery whether a 1000. note signed by both was and is the debt of Hunt or Bowler. He agrees with the master and the chancellor that the proof shows it to be the debt of Bowler, and that it was properly chargeable to him in this accounting, notwithstanding it is claimed that it had been included in a larger settlement.

The premises in controversy are about one hundred forty acres of farm land, which the evidence shows worth 1800.

Plaintiff in error does not controvert the wholesome doctrine that in the original bill the value was stated at 1,000. The master allowed as the material value 1000. a year. Plaintiff in error undertook to show that the material value to him of 1400. a year as a dairy farm. Chapman The master fixed the rent as high as the evidence of market value warranted. In no sense does evidence shows it has any greater value to the plaintiff in error because of a special use; therefore the lease was right in that respect, and we need not enter into a discussion of the law which does sometimes under some circumstances regard the market value of an article to be diminished by a special value which lies in creating a monopoly.

It is contended that the master erred in not allowing in the computation of interest the sum of [illegible] which

been stated by debit and credit with annual rests. Heartt v. Rhodes, 66 Ill. 352, is cited in support of this contention. It is there held that in case of partial payments the correct rule is as stated in McFadden v.Fortier, 20 Ill. 509, to calculate the interest on the note to the time of payment and if the payment exceeds the interest apply it first on the interest and the balance on the principal, and then calculate the interest on the balance of the principal. The case is not authority for the position that the account should be stated with annual rests, but the reverse. The rule in Heartt v.Rhodes, supra, in case of partial payments was recognized in Drury V.Wolfe, 154 Ill. 294, and by this court in Garlick v.Mutual Loan & Building Association, 129 Ill. App. 401, 415. Our attention is called to no later statute or decision affecting that rule; neither the method adopted by the master nor that contended for by plaintiff in error follows that rule. Defendant in error claims, we think correctly, that the method suggested by plaintiff in error would result in slightly increasing the amount found due. While it is true, as defendant in error suggests, that there could be no gain in redeeming property worth so much less than the amount of the indebtedness and therefore probably there will be no redemption and there is no liability for any deficiency, still plaintiff in error is entitled to a correct statement of the account, and if in the computation of interest an amount substantially too large was found it should be corrected. We are, however, satisfied that he was not prejudiced in that matter.

There was an effort to show waste in cutting trees and tearing down buildings while Funk was in possession of the premises, and we agree with the master and the chancellor that the evidence

did not warrant a finding in favor of plaintiff in error on that issue.

The decree enjoined the plaintiff in error from collecting his judgment in this court for costs rendered against defendant in error on the last hearing here. This is objected to and it is urged that the trial court could not interefere with the collection of an execution issued from the appellate court, but plaintiff in error in the statement of the account by the master had been credited with the amount of that judgment. It does not seem necessary to discuss the law governing the right of a circuit court to interfere with a process of the appellate court. It is sufficient to say that when a party to an accounting has a demand against his opponent allowed and thus practically paid, he is not harmed by a provision in the decree prohibiting him from further harrassing his opponent with attempts to collect it.

It is also objected that the decree makes perpetual the injunction theretofore issued against the prosecution of the forcible entry and detainer suit to get possession of the premises. It appeared on the hearing before the master that plaintiff in error had dismissed that suit; therefore he could not have been damaged by that part of the ~~decrex~~ decree. And irrespective of that consideration we do not see why it should not have been made perpetual.

It is argued that four months, the time fixed in the decree for redemption, is unreasonable and that the court had not the power to abridge the time fixed by statute for redemption in case of foreclosure of mortgages. In our last opinion we

did not warrant a finding in the [illegible] of plaintiff in [illegible] issue.

The court applied the principle in error [illegible] adjudging the judgment in favor for [illegible] plaintiff in error on the left hearing here. This is objected to and it is urged that the trial court could not [illegible] with the rejection of an exception issued from the [illegible] court, but plaintiff in error in the statement of the [illegible] by the [illegible] had been credited with the amount of that judgment. It does not seem necessary to discuss the law governing the right of a [illegible] court to interfere with a process of the [illegible] court. It is sufficient to say that [illegible] by the [illegible] the demand against the [illegible] plaintiff, he is not barred by a judgment in the [illegible] prohibiting him from further harassing his opponent with attempts to enforce it.

It is also contended that the [illegible] should be injunction therefore issued against the [illegible] of the [illegible] forcible entry and detainer with the execution of the [illegible]. It appeared on the hearing [illegible] that plaintiff in error had [illegible] the [illegible] damaged by that part of the [illegible]. The irreparable [illegible] that consideration we do not see why it should not [illegible] perpetual.

It is argued that [illegible], the [illegible] decree for [illegible], is [illegible] the power to enjoin the [illegible] in [illegible] of [illegible].

directed a decree to be entered permitting a redemption "within a time fixed therein". Plaintiff in error's cross bill in this case is in effect a bill to redeem. On such bill the practice is to give the complainant a fixed day within which to pay the amount found due upon the incumbrance. Usually ninety days is allowed for that purpose. (Sanders v. Peck, 131 Ill. 407, 421.) Therefore the decree in this respect is proper.

The decree is affirmed.

directed a decree to be entered prohibiting a rehearing within a time fixed therein. Plaintiff in error's sole will in this case is in effect a bill to redeem. Its sole bill is praying is to give the mortgagor a fixed day within which to pay the amount due as a condition. Ordinarily sixty days is allowed for that purpose. (Morris v. Ins. Co. 111 Ill. 67, 411.) Therefore the decree in this respect is proper.

The decree is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

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73098

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4/17/62	~~M. Gorelick~~	ST-2-0461
12/6	~~[illegible] Rosen~~	
12/6	~~[illegible]~~	
~~4/9/63~~	~~M. [illegible]~~	
12/10/63	[illegible] Beverlee	
~~[illegible]~~	~~[illegible]~~	
~~[illegible]~~	~~[illegible]~~	
	~~[illegible]~~	

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4/17/62	~~M Gerald~~	ST-2-0461
12/6	~~Norman Rosen~~	
12/6	~~E Salzman~~	
~~4/9/63~~	~~M. Israel~~	
12/6/63	R W Burke	
~~9/6/63~~	~~[illegible]~~	
~~4/10/64~~	~~A Sheehan~~	~~CEB 27444~~
	~~[illegible]~~	
	~~[illegible]~~	
~~2/2/71~~	~~B. Kirkman~~	~~786-6725~~
2-17-76	G.T. O'Connell	
6/4/76	E. Lanaan	
9/15/80	T. O'Brien	876-8906
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10/26	[illegible]	593-8666
11/6	[illegible]	[illegible]
11/27	[illegible]	[illegible]
11/27/74	[illegible]	263-3700
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